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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

A. In General

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

A. In General

§ 699. Police power, generally; definition

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

Police power is the exercise of the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society.

The "police power" is no more than the power to govern.[1] Since the term simply refers to governmental action not precluded by any specific provision in the federal or state constitutions, it has little or no useful meaning.[2]

Generally, the police power is the exercise of the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society.[3] It pertains to such rules and regulations relating to personal and property rights as affect the public health, public safety, and public welfare.[4]

The police power is an attribute of state sovereignty; it is generally an inherent power of the state legislature that extends to the whole system of internal regulation by which the State preserves public order, prevents offenses against the State, and insures to the people the enjoyment of rights and property reasonably consistent with like enjoyment of rights and property by others.[5] It is an inherent power in a government to enact laws to promote such goals.[6] It is a necessary attribute of every civilized

government[7] and the practical manifestation of each individual's agreement, as part of the social compact, to subject his rights to the common good when a conflict arises.[8]

Footnotes

1 Md.—VNA Hospice of Maryland v. Department of Health and Mental Hygiene, 406 Md. 584, 961 A.2d 557 (2008).

2 Md.—VNA Hospice of Maryland v. Department of Health and Mental Hygiene, 406 Md. 584, 961 A.2d 557 (2008).

3 Cal.—Richeson v. Helal, 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007).
Fla.—Hobby v. State, 761 So. 2d 1234 (Fla. 2d DCA 2000).
Ga.—All Star, Inc. v. Georgia Atlanta Amusements, LLC, 770 S.E.2d 22 (Ga. Ct. App. 2015).
Ind.—Lacy v. State, 903 N.E.2d 486 (Ind. Ct. App. 2009).
Kan.—Board of Educ. of Unified School Dist. No. 443, Ford County v. Kansas State Bd. of Educ., 266 Kan. 75, 966 P.2d 68, 130 Ed. Law Rep. 308 (1998).
Mo.—State v. Richard, 298 S.W.3d 529 (Mo. 2009).
N.C.—Kirby v. North Carolina Dept. of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015).
Okla.—Okfuskee County Rural Water Dist. No. 3 v. City of Okemah, 2011 OK CIV APP 65, 257 P.3d 1011 (Div. 3 2011).

4 Pa.—Redevelopment Authority of Oil City v. Woodring, 498 Pa. 180, 445 A.2d 724 (1982).
Utah—Peck v. Dunn, 574 P.2d 367 (Utah 1978).
State's right to interfere with vested property rights
Cal.—In re Marriage of Kelkar, 229 Cal. App. 4th 833, 176 Cal. Rptr. 3d 905 (2d Dist. 2014).

5 Okla.—Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).

6 Iowa—Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004).
Pa.—Ristvey v. Com., Dept. of Transp., 52 A.3d 425 (Pa. Commw. Ct. 2012).
W. Va.—Wampler Foods, Inc. v. Workers' Compensation Div., 216 W. Va. 129, 602 S.E.2d 805 (2004).
Wis.—Rusk v. City of Milwaukee, 2007 WI App 7, 298 Wis. 2d 407, 727 N.W.2d 358 (Ct. App. 2006).
W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
Inherent attribute of sovereignty
Police power is an inherent attribute of sovereignty with which the State is endowed for the protection and general welfare of its citizens.
Colo.—Town of Dillon v. Yacht Club Condominiums Home Owners Association, 2014 CO 37, 325 P.3d 1032 (Colo. 2014).

7 Ark.—Craighead Elec. Co-op. Corp. v. Craighead County, 352 Ark. 76, 98 S.W.3d 414 (2003).

8 Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

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VIII. Police Power

A. In General

§ 700. Power to tax distinguished

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, States 21(2)

The taxing power is exercised for the purpose of raising revenue and is subject to certain limitations while the police power is exercised only for the purpose of promoting the public welfare, and although this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence, the restrictions on the taxing power do not apply.

Although a single statute may include the exercise of both the police power and the power to tax,[1] the police power and the taxing power are different powers[2] and are controlled by different principles.[3] The taxing power is exercised for the purpose of raising revenue and is subject to certain limitations while the police power is exercised only for the purpose of promoting the public welfare, and although this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence, the restrictions on the taxing power do not apply.[4] Accordingly, the police power is coexistent with the taxing power but is in no way dependent on it.[5]

Distinction between tax and fee.

Fees, as opposed to taxes, imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used, or regulatory fees, including licensing and inspection fees, founded on the police power to regulate particular businesses or activities.[6] The distinction between a tax and a fee is that government imposes a "tax" for general revenue purposes, but a "fee" is imposed in the government's exercise of its police powers.[7] User fees involve the government selling a service to an individual, such as highway tolls or court filing fees, rather than exercising police powers that are generally applicable to the entire community.[8] Regulatory fees are founded on the State's police power to regulate a particular activity or business and serve regulatory purposes either directly by, for example, deliberately discouraging particular conduct by making it more expensive or indirectly by defraying an agency's regulation-related expenses.[9]

Footnotes

1 Ill.—Crocker v. Finley, 99 Ill. 2d 444, 77 Ill. Dec. 97, 459 N.E.2d 1346 (1984).
As to taxing power, generally, see C.J.S., Taxation §§ 7 to 75.

2 Ark.—Pickens v. McMath, 215 Ark. 332, 220 S.W.2d 602 (1949).

3 N.C.—Moose v. Barrett, 223 N.C. 524, 27 S.E.2d 532 (1943).

4 Ky.—Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 307 Ky. 689, 211 S.W.2d 867 (1948).
Mo.—Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947).
Pa.—Putney v. Abington Tp., 176 Pa. Super. 463, 108 A.2d 134 (1954).
Tax not regulation
A law enacted solely in exercise of power to tax does not regulate and hence cannot preempt regulation.
Or.—Terry v. City of Portland, 204 Or. 478, 269 P.2d 544 (1954).

5 Ind.—Department of Treasury v. Midwest Liquor Dealers, 113 Ind. App. 569, 48 N.E.2d 71 (1943).
Tenn.—State v. Anderson, 144 Tenn. 564, 234 S.W. 768, 19 A.L.R. 180 (1920).
Powers capable of harmonious employment
Generally, sovereign powers of taxation and of police may be mutually exerted, and these powers reside together and are capable of harmonious employment to effect ends of good government.
Mich.—Black v. Liquor Control Commission, 323 Mich. 290, 35 N.W.2d 269 (1948).

6 Mass.—Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).

7 Ark.—Rose v. Arkansas State Plant Bd., 363 Ark. 281, 213 S.W.3d 607 (2005).

8 N.Y.—Kessler v. Hevesi, 45 A.D.3d 474, 846 N.Y.S.2d 56 (1st Dep't 2007).

9 Mass.—Silva v. City Of Attleboro, 454 Mass. 165, 908 N.E.2d 722 (2009).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

A. In General

§ 701. Nature of power

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The police power, in its nature, is very broad and comprehensive and is founded on the duty of the State to protect the health, safety, and welfare of its citizens.

The police power is a governmental function,[1] an inherent attribute of sovereignty,[2] and the greatest and most powerful attribute of government.[3]

The police power is vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as it shall judge to be for the good and welfare of the state and of the subjects of the same.[4] The exercise of a state's police power must stem from a grant contained in the state constitution or be delegated by the legislature.[5] The police power exists without any reservation in the state constitution,[6] being founded on the duty of the State to protect the health, safety, and welfare of its citizens.[7]

The police power, in its nature, is very broad and comprehensive,[8] and the laws enacted for the purpose of regulation thereunder may be impolitic, harsh, and oppressive.[9] However, such laws may not be unduly harsh[10] or oppressive.[11] Although the police

power is broad, it is not without limits; it remains subject to the rule that the legislature cannot exercise any power that is expressly or impliedly forbidden by the state constitution, and the legislature, through its exercise of police power, may not render the constitution meaningless.[12]

The police power corresponds to the right of self-preservation in the individual,[13] and is an essential element in all orderly governments,[14] because it is necessary to the proper maintenance of the government and the general welfare of the community.[15]

The power comprehends reasonable preventative measures no less than the punishment of perpetrated offenses,[16] and it may act to prevent apprehended dangers as well as to control those already existing.[17] The police power depends on the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property, and it has been said to be the very foundation on which our social system rests.[18] The police power of the State is not limited to health, morals and safety; rather, it extends to economic needs as well.[19] It has for its object the improvement of economic[20] and social conditions affecting the community at large, with a view of bringing about "the greatest good of the greatest number."[21]

Footnotes

1 U.S.—Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977).
Ala.—City of Decatur v. Robinson, 251 Ala. 99, 36 So. 2d 673 (1948).

2 U.S.—City of El Paso v. Simmons, 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965).
Colo.—Town of Dillon v. Yacht Club Condominiums Home Owners Association, 2014 CO 37, 325 P.3d 1032 (Colo. 2014).
Okla.—Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).
Exercise not dependent on emergency
Police power is permanent right of sovereignty, and its exercise is not dependent on emergency.
N.J.—In re North Jersey Title Ins. Co., 120 N.J. Eq. 148, 184 A. 420 (Ch. 1936), aff'd, 120 N.J. Eq. 608, 187 A. 146 (Ct. Err. & App. 1936).

3 Pa.—Com. v. Widovich, 295 Pa. 311, 145 A. 295 (1929).
Central attribute of government
Ky.—Posey v. Com., 185 S.W.3d 170 (Ky. 2006).

4 N.C.—Kirby v. North Carolina Dept. of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015).

5 Wyo.—State ex rel. West Park Hosp. Dist. v. Skoric, 2014 WY 41, 321 P.3d 334 (Wyo. 2014).

6 Ohio—Vincent v. Elyria Bd. of Ed., 7 Ohio App. 2d 58, 36 Ohio Op. 2d 151, 218 N.E.2d 764 (9th Dist. Lorain County 1966).
Tex.—Martin v. Wholesome Dairy, Inc., 437 S.W.2d 586 (Tex. Civ. App. Austin 1969), writ refused n.r.e., (June 25, 1969).
Wash.—Reesman v. State, 74 Wash. 2d 646, 445 P.2d 1004 (1968).

7 Md.—Linkus v. Maryland State Bd. of Heating Ventilation, Air-Conditioning and Refrigeration Contractors, 114 Md. App. 262, 689 A.2d 1254 (1997).
N.M.—In re McCain, 1973-NMSC-023, 84 N.M. 657, 506 P.2d 1204 (1973).
Tex.—Jefco, Inc. v. Lewis, 520 S.W.2d 915 (Tex. Civ. App. Austin 1975), writ refused n.r.e., (July 23, 1975).
Va.—Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).
Public necessity
Police power is founded in public necessity, which justifies its exercise.
Conn.—State v. Heller, 123 Conn. 492, 196 A. 337 (1937).
Duty to act
(1) Legislature has a duty to enact laws providing for general welfare and safety of people within state.
Ind.—State ex rel. Mavity v. Tyndall, 225 Ind. 360, 74 N.E.2d 914 (1947).

(2) There is no constitutional provision which imposes a duty on a state to provide services to its citizens.
U.S.—New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973).
8 N.Y.—Dobrzenski v. Village of Hamburg, 277 A.D.2d 1005, 715 N.Y.S.2d 819 (4th Dep't 2000).
Okla.—State v. Nevins, 1980 OK CR 30, 611 P.2d 251 (Okla. Crim. App. 1980).
W. Va.—PNGI Charles Town Gaming, LLC v. Reynolds, 229 W. Va. 123, 727 S.E.2d 799 (2011).

Almost infinite variety of subjects embraced

U.S.—Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 89 S. Ct. 354, 21 L. Ed. 2d 334 (1968).

Comprehends power to make and enforce reasonable laws and regulations

The police power comprehends the power to make and enforce all reasonable laws and regulations necessary for the advancement and protection of the public welfare; it cannot be invoked except to protect and promote public morals, health, safety, and prosperity.
Okla.—Okfuskee County Rural Water Dist. No. 3 v. City of Okemah, 2011 OK CIV APP 65, 257 P.3d 1011 (Div. 3 2011).
9 Cal.—D'Amico v. Brock, 122 Cal. App. 2d 63, 264 P.2d 120 (3d Dist. 1953).
Iowa—Jacobs v. City of Chariton, 245 Iowa 1378, 65 N.W.2d 561 (1954).
W. Va.—State ex rel. Morris v. West Virginia Racing Commission, 133 W. Va. 179, 55 S.E.2d 263 (1949).

Strict liability

In exercise of power, State may impose liability without fault.
Ala.—Walker v. State, 356 So. 2d 672 (Ala. 1977).
10 Ill.—In re Torski C., 395 Ill. App. 3d 1010, 335 Ill. Dec. 405, 918 N.E.2d 1218 (4th Dist. 2009).
Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).
11 Pa.—Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).
12 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).
Limitations on police power, generally, see §§ 711 to 720.
13 U.S.—Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).
Ala.—Jones v. State, 56 Ala. App. 280, 321 So. 2d 247 (Crim. App. 1975).
N.Y.—DeLury v. City of New York, 51 A.D.2d 288, 381 N.Y.S.2d 236 (1st Dep't 1976).
14 U.S.—Comtronics, Inc. v. Puerto Rico Telephone Co., 409 F. Supp. 800 (D.P.R. 1975), judgment aff'd, 553 F.2d 701 (1st Cir. 1977).
Ky.—Roe v. Com., 405 S.W.2d 25 (Ky. 1966).
Wash.—Spokane County v. Valu-Mart, Inc., 69 Wash. 2d 712, 419 P.2d 993 (1966).

Law of necessity

Police power is law of necessity.
N.J.—Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954).
15 Mass.—Com. v. Ora, 451 Mass. 125, 883 N.E.2d 1217 (2008).
Tenn.—H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444, 12 A.L.R.4th 835 (Tenn. 1979).
Tex.—Texas State Bd. of Pharmacy v. Gibson's Discount Center, Inc., 541 S.W.2d 884 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Mar. 9, 1977).
W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
16 U.S.—Jung v. City of Winona, 71 F. Supp. 558 (D. Minn. 1947).
N.J.—State v. Gaynor, 119 N.J.L. 582, 197 A. 360 (N.J. Ct. Err. & App. 1938).

Blocking evasive techniques

In area of regulation, statute may push beyond debatable limits in order to block evasive techniques.
Cal.—Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968).

Assumptions unprovable or unproved

(1) Unprovable assumption may be acted on by states in areas of public control.
U.S.—Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).
(2) Legislatures properly may rely on scientifically unproven assumptions both in regulation of commercial and business transactions and for protection of broad social interests in order and morality.
D.C.—U. S. v. Moses, 339 A.2d 46 (D.C. 1975).

17 U.S.—Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).
Colo.—People v. Hoehl, 193 Colo. 557, 568 P.2d 484 (1977).
N.Y.—McCallin v. Walsh, 64 A.D.2d 46, 407 N.Y.S.2d 852 (1st Dep't 1978), order aff'd, 46 N.Y.2d 808, 413 N.Y.S.2d 922, 386 N.E.2d 833 (1978).

Delayed impact

Authority of state to control activities of its citizens is not limited to activities which have a present and immediate impact on public health or welfare.
Alaska—Ravin v. State, 537 P.2d 494 (Alaska 1975).

Possession of devices or products

Mere possession of dangerous or deleterious devices or products may be forbidden by State under its police powers.
D.C.—Smith v. District of Columbia, 436 A.2d 53 (D.C. 1981).

18 Ga.—De Berry v. City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).
N.C.—Kirby v. North Carolina Dept. of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015).
Va.—Mumpower v. Housing Authority of City of Bristol, 176 Va. 426, 11 S.E.2d 732 (1940).

Giving up rights for public benefit

Power to pass laws regulating persons and property stems from theory that when persons choose to live in groups, they must give up some individual freedom for good of group.
La.—City of Shreveport v. Curry, 357 So. 2d 1078 (La. 1978).

19 U.S.—New York State Correctional Officers & Police Benev. Ass'n, Inc. v. New York, 911 F. Supp. 2d 111 (N.D. N.Y. 2012).
Ill.—Commonwealth Edison Co. v. Illinois Commerce Com'n, 398 Ill. App. 3d 510, 338 Ill. Dec. 539, 924 N.E.2d 1065 (2d Dist. 2009).

20 Wis.—Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).

21 Md.—Maryland Coal & Realty Co. v. Bureau of Mines of State, 193 Md. 627, 69 A.2d 471 (1949).
Mich.—People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945).
N.C.—Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

A. In General

§ 702. Scope of power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

It is inadvisable to attempt to frame any definition of the police power which indicates the limits of such power by including everything to which it may extend and excluding everything to which it cannot extend; the courts consider it better to decide on a case-by-case basis whether the police power extends thereto.

The United States Constitution created a federal government of limited powers while reserving a generalized police power to the states.[1] It is difficult, if not impossible, definitely to fix the bounds of the police powers of the states,[2] and it is deemed inadvisable to attempt to frame any definition which indicates the limits of the police power by including everything to which it may extend and excluding everything to which it cannot extend.[3] The courts consider it better to decide on a case-by-case basis whether the police power extends thereto[4] as the power is coextensive with the necessities of the case and the safeguards of the public interest.[5]

The scope of the police power is as broad as the public welfare or necessity.[6] It is one of the least limitable of the powers of government[7] and is the broadest in scope of any field of governmental activity.[8] The police power of a state is as plenary[9] and

broad as its taxing power, and property within the state is subject to the operations of the former as long as it is within the regulating restrictions of the latter.[10]

For a statute to be a proper exercise of police power, it must be appropriate and reasonably necessary to accomplish a purpose within the scope of the police power.[11] Within the realm of police power, the legislature may act in any matter that falls within the dictates of the constitution.[12] According to other authority, the ability of the State to provide for the health, safety, and welfare of the citizen is inherent in the police power without any express statutory or constitutional provision.[13] The police power extends to all matters which concern the regulation and control of the internal affairs of the State,[14] and may even directly affect the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor discriminatory.[15] Protection of the public health, safety, morals, and general welfare are the goals commonly included as within the lawful scope of the State's police powers.[16]

The possession and enjoyment of all rights are subject to a reasonable exercise of the police power,[17] and the rights of individuals must yield to the superior demand of the police power.[18] The very essence of the police power is that the deprivation of individual rights and property cannot prevent its operation.[19]

In the exercise of police powers, a state has a wide discretion in determining its own public policy and what measures are necessary for its own protection and to properly promote safety, peace, and good order of its people.[20] From its very nature, the police power is a power to be exercised within the wide limits of legislative discretion, and if a statute appears to be within the apparent scope of this power, the courts will not inquire into its wisdom and policy or undertake to substitute their discretion for that of the legislature.[21] Where a statute, ordinance, or regulation presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in the legislative discretion, and every presumption is to be indulged in favor of the exercise of that discretion unless arbitrary action is clearly disclosed.[22] Accordingly, the police power of the State extends to all great public needs,[23] including the protection and promotion of the safety, health, comfort, and quiet of all persons, and the protection of all property within the state,[24] and the execution of all contracts affecting such matters,[25] as well as the prevention of discrimination and economic oppression,[26] and the promotion of the public convenience and general prosperity.[27]

The police power is not confined to the physical welfare of the public but includes spiritual, aesthetic, and monetary welfare,[28] as well as general moral[29] and intellectual well-being and development;[30] it extends beyond health, morals, and safety, and comprehends the duty, within constitutional limitations, to protect the peaceful enjoyment of the home and the well-being and tranquility of a community.[31] In enacting police regulations, however, a state is not bound to cover the entire field of possible abuses.[32]

The police power extends to the enactment of all laws which, in contemplation of the state constitution, are reasonably necessary to promote the welfare of the public,[33] as distinguished from the interest of a particular class,[34] and under such power, the State has authority to enact laws applicable to particular classes[35] although the legislature may not exercise the police power for private purposes or for the exclusive benefit of individuals or classes.[36]

The police power of the State extends to economic needs.[37] A state, pursuant to its inherent police powers, may regulate businesses for the protection of the public health, safety, and welfare.[38] The right to pursue a trade, occupation, business, or profession is limited by the right of the State to regulate, through the proper exercise of its police power.[39] If any business becomes of such a character as to be sufficiently affected with public interest, under the police power there may be a legislative

interference and regulation of it in order to secure the general comfort, health, and prosperity of the state provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end.[40] The police power of the State may be exerted to preserve and protect the public morals; it may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry.[41]

There is no constitutional right to conduct a business so as to injure the public.[42] Nevertheless, the legislature can declare that acts which might be unlawful if carried to excess, by reason of their general tendency to annoy and injure others, may be lawfully done on such conditions as it may prescribe.[43] On the other hand, legislation enacted under the police power is not invalid merely because of its incidental effect[44] or because compliance is burdensome.[45]

The police power of the State cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past.[46] The police power is not a fixed quantity, and it changes from time to time to meet changed conditions of society;[47] it is extensive,[48] elastic,[49] evolving,[50] Expanding, or contracting in response to changing conditions and needs[51] or to meet new and increasing demands.[52] A police regulation, valid when made, may become arbitrary and confiscatory in operation by reason of later events.[53] It is more accurate to say, however, that the power itself remains the same and that its apparent extension is only the application of the principle on which it is based to new conditions as they arise.[54]

The State may exercise its police power whenever the public interests demand it[55] to select measures necessary to secure and protect the same.[56] The police power is not exhausted by being once exercised on any subject falling within its scope,[57] but it may be exercised repeatedly as often as occasion may require.[58] The right to exercise the police power is a continuing one,[59] which is not lost by nonexercise but remains to be exerted as local exigencies may demand;[60] nor can it be barred or suspended by contract or irrepealable law, and it cannot be bartered away even by express contract.[61]

Territorial boundaries.

The State's exercise of its police power extends to its territorial boundaries.[62]

CUMULATIVE SUPPLEMENT

Cases:

State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers. Torres v. Lynch, 136 S. Ct. 1619 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

2 U.S.—First Nat. Ben. Soc. v. Garrison, 58 F. Supp. 972 (S.D. Cal. 1945), judgment aff'd, 155 F.2d 522 (C.C.A. 9th Cir. 1946).
Tenn.—H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444, 12 A.L.R.4th 835 (Tenn. 1979).

3 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
Limitations on police power, generally, see §§ 711 to 720.

4 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
La.—New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002).

5 Ga.—State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000).

6 Ariz.—State v. Burns, 121 Ariz. 471, 591 P.2d 563 (Ct. App. Div. 1 1979).
Wash.—State v. Clinkenbeard, 130 Wash. App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850 (Div. 3 2005).

7 U.S.—Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946).
N.M.—Santa Fe Community School v. New Mexico State Bd. of Ed., 1974-NMSC-005, 85 N.M. 783, 518 P.2d 272 (1974).

8 Cal.—Magan Medical Clinic v. California State Bd. of MedicalExaminers, 249 Cal. App. 2d 124, 57 Cal. Rptr. 256 (2d Dist. 1967).

9 La.—Carbo v. City of Slidell, 844 So. 2d 1 (La. Ct. App. 1st Cir. 2003), writ denied, 842 So. 2d 400 (La. 2003).
N.J.—In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly, 210 N.J. 29, 40 A.3d 684 (2012).

10 U.S.—Kidd v. Pearson, 128 U.S. 1, 9 S. Ct. 6, 32 L. Ed. 346 (1888).

11 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

12 La.—New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002).
Mass.—Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

13 Nev.—State v. Eight Judicial Dist. Court, In and For State, Clark County, 101 Nev. 658, 708 P.2d 1022 (1985).

14 Ala.—Perry v. Southern Express Co., 202 Ala. 663, 81 So. 619 (1919).
Del.—State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951).

15 Cal.—20th Century Ins. Co. v. Superior Court, 90 Cal. App. 4th 1247, 109 Cal. Rptr. 2d 611 (2d Dist. 2001).

16 N.C.—Massey v. Hoffman, 184 N.C. App. 731, 647 S.E.2d 457 (2007).

17 U.S.—Gundling v. City of Chicago, 177 U.S. 183, 20 S. Ct. 633, 44 L. Ed. 725 (1900); Johnson v. American Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008).
Ill.—Berz v. City of Evanston, 2013 IL App (1st) 123763, 375 Ill. Dec. 422, 997 N.E.2d 733 (App. Ct. 1st Dist. 2013), appeal denied, 378 Ill. Dec. 229, 3 N.E.3d 794 (Ill. 2014).
Iowa—Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004).
La.—Parish of St. Charles v. R.H. Creager, Inc., 55 So. 3d 884 (La. Ct. App. 5th Cir. 2010), writ denied, 60 So. 3d 1250 (La. 2011).
Mo.—State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009).

18 Okla.—Utility Supply Co., Inc. v. City of Broken Arrow, 1975 OK 106, 539 P.2d 740 (Okla. 1975).
Rights of individual yielding to police power
If the right of an individual runs afoul of the exercise of the police power, the right of the individual must yield.
Ky.—Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government, 131 S.W.3d 745 (Ky. 2004).

19 Cal.—San Diego County Veterinary Medical Ass'n v. County of San Diego, 116 Cal. App. 4th 1129, 10 Cal. Rptr. 3d 885 (4th Dist. 2004).

20 U.S.—East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945).
Fla.—Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5th DCA 2006).
Ind.—Paul Stieler Enterprises, Inc. v. City of Evansville, 2 N.E.3d 1269 (Ind. 2014).
Mo.—State v. Richard, 298 S.W.3d 529 (Mo. 2009).
Broad discretion to determine what is harmful to public health and welfare
Ky.—Pitcock v. Com., 295 S.W.3d 130 (Ky. Ct. App. 2009).
Determining what public interest and welfare require
The legislature, pursuant to its police power, has wide latitude in determining what the public interest and welfare require and to determine the measures needed to secure such interest, but this discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law.
Ill.—People v. Williams, 394 Ill. App. 3d 286, 333 Ill. Dec. 744, 915 N.E.2d 815 (1st Dist. 2009).

21 Mo.—Damon v. City of Kansas City, 419 S.W.3d 162 (Mo. Ct. App. W.D. 2013), transfer denied, (Dec. 24, 2013) and transfer denied, (Feb. 25, 2014).

22 Idaho—Dry Creek Partners, LLC, v. Ada County Com'rs, ex rel. State, 148 Idaho 11, 217 P.3d 1282 (2009).

23 N.C.—Hartford Acc. & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

24 Minn.—C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447 (Minn. Ct. App. 2007).
Mo.—State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009).
N.H.—Opinion of the Justices, 128 N.H. 46, 509 A.2d 749 (1986).
Ohio—Maple Hts. v. Ephraim, 178 Ohio App. 3d 439, 2008-Ohio-4576, 898 N.E.2d 974 (8th Dist. Cuyahoga County 2008).

25 U.S.—East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945).
La.—State v. Edwards, 787 So. 2d 981 (La. 2001).
Contracts subject to reasonable constraints under police power
Kan.—Double M Const., Inc. v. State Corp. Com'n, 288 Kan. 268, 202 P.3d 7 (2009).
Prospective limitation, and retroactive impairment, of contracts
The Legislature's general police power gives it broad authority to limit prospectively what parties may contract for, but it may retroactively impair existing contracts only through the necessary police power, which is much narrower; legislation that invades freedom of contract can only be sustained if it both relates to the claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective.
Ind.—Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc., 988 N.E.2d 250 (Ind. 2013).

26 Cal.—Way v. Superior Court, 74 Cal. App. 3d 165, 141 Cal. Rptr. 383 (3d Dist. 1977).
Mich.—Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd., 397 Mich. 337, 245 N.W.2d 1 (1976).

27 Conn.—Whitfield v. Empire Mut. Ins. Co., 167 Conn. 499, 356 A.2d 139 (1975).
Pa.—Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901 (2013).

28 Ky.—Hendricks v. Com., 865 S.W.2d 332 (Ky. 1993).

29 Ill.—Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 286 Ill. Dec. 566, 814 N.E.2d 216 (4th Dist. 2004), judgment aff'd, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005).
W. Va.—Wampler Foods, Inc. v. Workers' Compensation Div., 216 W. Va. 129, 602 S.E.2d 805 (2004).

30 N.M.—Santa Fe Community School v. New Mexico State Bd. of Ed., 1974-NMSC-005, 85 N.M. 783, 518 P.2d 272 (1974).

31 U.S.—Breard v. City of Alexandria, La., 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233, 62 Ohio L. Abs. 210, 35 A.L.R.2d 335 (1951) (abrogated on other grounds by, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980)).
N.D.—State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (N.D. 2006).
Tex.—State v. Holcombe, 145 S.W.3d 246 (Tex. App. Fort Worth 2004), petition for discretionary review granted, (Apr. 27, 2005) and judgment aff'd, 187 S.W.3d 496 (Tex. Crim. App. 2006).

32 U.S.—City of New Orleans v. Dukes, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).
N.C.—State ex rel. Utilities Commission v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

33 Fla.—Harris v. Martin Regency, Ltd., 576 So. 2d 1294 (Fla. 1991).
N.M.—Regents of University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236, 129 Ed. Law Rep. 468 (1998).

34 Iowa—Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995).
Pa.—Adams Sanitation Co., Inc. v. Com., Dept. of Environmental Protection, 552 Pa. 304, 715 A.2d 390 (1998).

35 Conn.—Amsel v. Brooks, 141 Conn. 288, 106 A.2d 152, 45 A.L.R.2d 1234 (1954).
Ind.—Hanley v. State, 234 Ind. 326, 123 N.E.2d 452 (1954).

36 § 713.

37 Ill.—Commonwealth Edison Co. v. Illinois Commerce Com'n, 398 Ill. App. 3d 510, 338 Ill. Dec. 539, 924 N.E.2d 1065 (2d Dist. 2009).

38 Ill.—Leavell v. Department of Natural Resources, 397 Ill. App. 3d 937, 337 Ill. Dec. 978, 923 N.E.2d 829 (5th Dist. 2010).

39 Ill.—Alarm Detection Systems, Inc. v. Village of Hinsdale, 326 Ill. App. 3d 372, 260 Ill. Dec. 599, 761 N.E.2d 782 (2d Dist. 2001).
S.C.—Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006).
40 Minn.—Dean v. City of Winona, 843 N.W.2d 249 (Minn. Ct. App. 2014), review granted, (May 20, 2014).
41 N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).
42 N.J.—State v. New Jersey Trade Waste Ass'n, 191 N.J. Super. 144, 465 A.2d 596 (Law Div. 1983).
43 Mass.—Landers v. Eastern Racing Ass'n, 327 Mass. 32, 97 N.E.2d 385 (1951).
44 Ky.—City of Florence v. Owen Elec. Co-op., Inc., 832 S.W.2d 876 (Ky. 1992).
Tex.—Martinez v. State, 744 S.W.2d 224 (Tex. App. Houston 14th Dist. 1987).
45 Colo.—Town of Dillon v. Yacht Club Condominiums Home Owners Association, 2014 CO 37, 325 P.3d 1032 (Colo. 2014).
46 W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
47 U.S.—Helvering v. Davis, 301 U.S. 619, 301 U.S. 672, 57 S. Ct. 904, 81 L. Ed. 1307, 109 A.L.R. 1319 (1937).
W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
48 W. Va.—Wampler Foods, Inc. v. Workers' Compensation Div., 216 W. Va. 129, 602 S.E.2d 805 (2004).
Extensive as may be required
N.C.—Kirby v. North Carolina Dept. of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015).
49 Ohio—Brkic v. Cleveland, 124 Ohio App. 3d 271, 706 N.E.2d 10 (8th Dist. Cuyahoga County 1997).
W. Va.—Wampler Foods, Inc. v. Workers' Compensation Div., 216 W. Va. 129, 602 S.E.2d 805 (2004).
50 W. Va.—Wampler Foods, Inc. v. Workers' Compensation Div., 216 W. Va. 129, 602 S.E.2d 805 (2004).
51 Ohio—Brkic v. Cleveland, 124 Ohio App. 3d 271, 706 N.E.2d 10 (8th Dist. Cuyahoga County 1997).
52 W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
53 U.S.—Abie State Bank v. Weaver, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931).
Okla.—State v. Nevins, 1980 OK CR 30, 611 P.2d 251 (Okla. Crim. App. 1980).
54 Iowa—John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89 (Iowa 1977).
Scope commensurate with public exigencies
Quality and scope of police power are commensurate with public exigencies arising from changing social and economic conditions.
N.J.—Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405, 88 A.2d 607 (1952).
55 Minn.—Dean v. City of Winona, 843 N.W.2d 249 (Minn. Ct. App. 2014), review granted, (May 20, 2014).
N.D.—Continental Resources, Inc. v. Farrar Oil Co., 1997 ND 31, 559 N.W.2d 841 (N.D. 1997).
56 Wash.—State v. Bryan, 145 Wash. App. 353, 185 P.3d 1230 (Div. 1 2008).
57 La.—Villavaso v. Barthet, 39 La. Ann. 247, 1 So. 599 (1887).
Minn.—Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N.W.2d 255 (1954).
58 S.C.—Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954).
59 Cal.—Richeson v. Helal, 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007).
Minn.—Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N.W.2d 255 (1954).
60 U.S.—Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 58 S. Ct. 87, 82 L. Ed. 3 (1937).
W. Va.—Hinebaugh v. James, 119 W. Va. 162, 192 S.E. 177, 112 A.L.R. 59 (1937).
61 Cal.—Richeson v. Helal, 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007).
62 Haw.—In re Doe, 99 Haw. 522, 57 P.3d 447 (2002).

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16A C.J.S. Constitutional Law § 703

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§ 703. Mode of exercising power

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In suppressing what it regards as a public evil, a state may adopt any reasonable measures which it may deem necessary in the exercise of its police power so long as the measures are procedurally fair and reasonably related to a proper legislative goal.

The police power may be used in any manner not prohibited.[1] In suppressing what it regards as a public evil, a state may adopt any reasonable measures which it may deem necessary in the exercise of its police power[2] so long as the measures are procedurally fair and reasonably related to a proper legislative goal.[3] Thus, the measures must be reasonably related to a substantial public purpose[4] or a legitimate government end.[5] Accordingly, a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and to enforce that policy by legislation adapted to its purpose.[6] Legislatures have constitutional authority to experiment with new techniques[7] and may rely on rational intuition and simple logic in determining what laws will advance the public interest.[8]

The policy of a state may rely for the common good on the free play of conflicting interests and leave conduct unregulated,[9] or the State may deem it a wiser policy to regulate conduct.[10] The form a regulation should take and its scope are matters of policy and, as such, within a state's choice.[11] Legislatures are empowered to pass laws to meet the pressing social needs of the times even if those laws seem to others ill-advised or later prove to be failures.[12] Nevertheless, the form of government regulation chosen must bear a reasonable or rational relationship to the public good being pursued by the government and must not unreasonably restrict particular rights being curtailed.[13] If the object to be accomplished is conducive to the public interest, a legislature may exercise a large liberty of choice in the means employed to enforce an exercise of its police powers.[14]

The legislative bodies are not obliged to shape regulations under the police power with mathematical exactitude,[15] precision,[16] or nicety.[17] When the subject of legislation falls under the police powers of the State, activities may be prohibited altogether, limited as to place and location, or where operation is permitted, may be regulated by rules of conduct.[18] The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel other than necessary movement reasonably excepted from the prohibition.[19]

Generally, the police power may be exercised in the usual and ordinary mode by means of legislative acts,[20] or the regulation may be left to the ad hoc judicial process.[21]

Where necessary, a state in the exercise of its police power may take proper summary action to protect the health or safety of its citizens.[22]

Footnotes

1 Ark.—Hickenbottom v. McCain, 207 Ark. 485, 181 S.W.2d 226 (1944).
Fla.—Belk-James, Inc. v. Nuzum, 358 So. 2d 174 (Fla. 1978).
Change in substantive law
Wash.—Suburban Fuel Co. v. Lamoreaux, 4 Wash. App. 179, 480 P.2d 216 (Div. 1 1971).

2 U.S.—Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S. Ct. 44, 57 L. Ed. 184 (1912).
Ill.—Pozner v. Mauck, 73 Ill. 2d 250, 22 Ill. Dec. 727, 383 N.E.2d 203 (1978).
N.Y.—Application of Siebert, 99 Misc. 2d 32, 415 N.Y.S.2d 589 (Sup 1979).

3 Cal.—Starving Students, Inc. v. Department Of Industrial Relations, Div. of Labor Standards Enforcement, 125 Cal. App. 4th 1357, 23 Cal. Rptr. 3d 583 (2d Dist. 2005).

4 Conn.—Gibbons v. Historic Dist. Com'n of Town of Fairfield, 285 Conn. 755, 941 A.2d 917 (2008).

5 Minn.—C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447 (Minn. Ct. App. 2007).

6 U.S.—Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
Minn.—Federal Distillers, Inc. v. State, 304 Minn. 28, 229 N.W.2d 144 (1975).
Or.—Savage v. Martin, 161 Or. 660, 91 P.2d 273 (1939).
Wide latitude; inexact distinctions
States are accorded wide latitude in regulation of their local economies under police powers and rational distinctions may be made with substantially less than mathematical exactitude.
U.S.—City of New Orleans v. Dukes, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).

7 U.S.—Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952).
N.J.—Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004).
Wis.—State v. Amoco Oil Co., 97 Wis. 2d 226, 293 N.W.2d 487 (1980).
Improvement
There need not be identifiable evil which legislature intends to correct; legislature is as free to experiment with other ways of dealing with subject in hope of making a good system better as it is to correct a perceived evil system.

Mich.—Shavers v. Kelley, 402 Mich. 554, 267 N.W.2d 72 (1978).

8 N.J.—Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004).

9 U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 29 A.L.R.2d 313 (1951).

10 U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 29 A.L.R.2d 313 (1951).

11 U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

12 N.J.—Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004).

13 Wis.—Peppies Courtesy Cab Co. v. City of Kenosha, 165 Wis. 2d 397, 475 N.W.2d 156 (1991).

14 U.S.—Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).

N.C.—State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

Tenn.—New Rivieria Arts Theatre v. State ex rel. Davis, 219 Tenn. 652, 412 S.W.2d 890 (1967).

Taxation

Exercise of police power may take form of taxation of activities which it is desired to regulate or discourage.

Cal.—Western & Southern Life Ins. Co. v. State Bd. of Equalization, 4 Cal. App. 3d 21, 84 Cal. Rptr. 88 (2d Dist. 1970).

Penalties

(1) State may impose reasonable penalties as the means of securing obedience to statutes validly enacted under police power.

Cal.—Hale v. Morgan, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).

(2) Enactment of statutes providing additional "cost" in any criminal prosecution resulting in plea of guilty or nolo contendere or in conviction and that surcharge be added to any fine or civil penalty prescribed by law were valid exercises of police power.

Fla.—State v. Champe, 373 So. 2d 874 (Fla. 1978).

15 U.S.—Star Scientific Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002).

Cal.—Interstate Marina Development Co. v. County of Los Angeles, 155 Cal. App. 3d 435, 202 Cal. Rptr. 377 (2d Dist. 1984).

Rational distinctions made with substantially less than mathematical exactitude

La.—City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320 (La. 2014).

16 U.S.—Templeton Coal Co., Inc. v. Shalala, 882 F. Supp. 799 (S.D. Ind. 1995), decision aff'd, 75 F.3d 1114 (7th Cir. 1996).

17 Ill.—Meeker v. Tulis, 134 Ill. App. 3d 1093, 90 Ill. Dec. 10, 481 N.E.2d 810 (5th Dist. 1985).

18 U.S.—Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).

Cal.—People v. Sullivan, 60 Cal. App. 2d 539, 141 P.2d 230 (4th Dist. 1943).

Ga.—De Berry v. City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

19 N.C.—Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618 (2007), decision aff'd, 362 N.C. 328, 661 S.E.2d 728 (2008).

20 Iowa—Schnieders v. Incorporated Town of Pocahontas, 213 Iowa 807, 234 N.W. 207 (1931).

Miss.—Pathfinder Coach Division of Superior Coach Corp. v. Cottrell, 216 Miss. 358, 62 So. 2d 383 (1953).

N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 29 A.L.R.2d 313 (1951).

Restraint of trade statutes

U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

Enactment, repeal, or modification

State in exercise of its police powers may make, repeal, alter, or modify laws for protection of public.

Ga.—Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953).

21 N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 29 A.L.R.2d 313 (1951).

Common-law mode of dealing with restraints of trade

U.S.—Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

22 **Administrative action**

Where a compelling public interest is present, legislature may constitutionally authorize summary administrative action in exercise of police power subject to later judicial review of validity of such action.

Tex.—Nunley v. Texas Animal Health Commission, 471 S.W.2d 144 (Tex. Civ. App. San Antonio 1971), writ refused n.r.e., (Jan. 26, 1972).

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Research References

A.L.R. Library

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16A C.J.S. Constitutional Law § 704

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§ 704. Who may exercise police power, generally; federal or state government or political subdivisions thereof, generally

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
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The police power rests with the individual states and is primarily vested in the state legislatures; the United States has no general police power, although it has power comparable to the police power of a state, when appropriate to the exercise of any attribute of sovereignty specifically granted to the federal government by the states.

Since the police power has not been delegated by the Federal Constitution or the several states to the United States, it remains with the individual states.[1] It is a grant of authority from the people through their constitution to their government agents.[2] It is reserved to[3] the State, and thereafter, the legislature is primarily vested with the State's police power.[4]

Political subdivisions of a state have no inherent claim to the police power.[5] According to other authority, the police power may be exercised by the State and its political subdivisions.[6] The power, however, generally cannot be exercised by any group or body of individuals not possessing legislative power[7] although there is some authority to the effect that on proper occasions the police power may be exercised by the courts.[8]

Although the United States Constitution does not recognize absolute and uncontrollable liberty and society is free to enact laws against evils which menace the health, safety, morals, and welfare of the people,[9] the United States has no general police power.[10] Nevertheless the United States has power, comparable to the police power of a state, when appropriate to the exercise of any attribute of sovereignty specifically granted to the federal government by the states[11] and may, by virtue of its sovereignty, take such measures as are necessary to insure peace and order in the performance of any of its functions.[12]

Congress, unlike the states, lacks the general police power.[13] As the legislative voice of a government of limited powers, Congress cannot sanction for the general welfare.[14] Thus, within the states, Congress may exercise no police power as such,[15] and may effect it only by the enactment of statutes within the powers conferred on it by the Constitution of the United States, either expressly or by clear implication.[16] When the United States exerts any of the powers conferred on it by the Federal Constitution, no valid objection can be made based on the fact that such exercise may be attended by the same incident which attends an exercise by a state of its police power.[17]

Alienation, surrender, or abridgment of power.

Generally, neither a state legislature nor any inferior legislative body to which a portion of the police power has been granted can abdicate, surrender, abridge,[18] alienate,[19] or bargain away[20] the right to exercise such power.In some jurisdictions, however, no provision of controlling law expressly forbids such action.[21]

Footnotes

1 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).
N.C.—City of Raleigh v. Norfolk S. Ry. Co., 275 N.C. 454, 168 S.E.2d 389 (1969).
Okla.—King v. City of Tulsa, 1966 OK CR 89, 415 P.2d 606 (Okla. Crim. App. 1966).

2 La.—State Civil Service Com'n v. Department of Public Safety Director, 873 So. 2d 636 (La. 2004).

3 U.S.—U.S. v. McCoy, 323 F.3d 1114 (9th Cir. 2003).
N.H.—State Employees' Ass'n of New Hampshire v. State, 161 N.H. 730, 20 A.3d 961 (2011).

4 Ky.—Posey v. Com., 185 S.W.3d 170 (Ky. 2006).
N.J.—In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly, 210 N.J. 29, 40 A.3d 684 (2012).
Pa.—Meitner v. Cheltenham Tp., 75 Pa. Commw. 46, 460 A.2d 1235 (1983).
W. Va.—State v. Ivey, 196 W. Va. 571, 474 S.E.2d 501 (1996).
Exercise of legislative discretion
(1) In general.
Idaho—Dry Creek Partners, LLC, v. Ada County Com'rs, ex rel. State, 148 Idaho 11, 217 P.3d 1282 (2009).
(2) From its very nature, the police power is a power to be exercised within wide limits of legislative discretion, and if a statute appears to be within the apparent scope of this power, the courts will not inquire into its wisdom and policy, or undertake to substitute their discretion for that of the legislature.
Mo.—City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005).

5 U.S.—XO Missouri, Inc. v. City of Maryland Heights, 362 F.3d 1023 (8th Cir. 2004).
Delegation of police power, generally, see §§ 705, 706.

6 Minn.—C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447 (Minn. Ct. App. 2007).

7 Fla.—Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).
N.C.—City of Raleigh v. Norfolk S. Ry. Co., 275 N.C. 454, 168 S.E.2d 389 (1969).
Pa.—Appeal of Goodman, 305 Pa. 55, 156 A. 309 (1931).

8 Fla.—Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

Ky.—Workmen's Compensation Board of Kentucky v. Abbott, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789 (1925).

Functions of legislature and judiciary with respect to limitation of the police power, generally, see §§ 717 to 720.

Rule for the bar

Police power is not exclusively power of legislative department, but rather, police power can on occasion be exercised by courts; promulgation of rule, which required attorneys in active practice to pay annual registration fee to board of overseers of the bar, was such an occasion.

Me.—Board of Overseers of The Bar v. Lee, 422 A.2d 998 (Me. 1980).

9 Neb.—State ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991) (disapproved of on other grounds by, American Amusements Co. v. Nebraska Dept. of Revenue, 282 Neb. 908, 807 N.W.2d 492 (2011)).

10 U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

Fla.—McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950).

11 U.S.—Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

Fla.—Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943).

Ohio—Divisional Code Authority No. 23 Retail Solid Fuel Industry v. Reisenberg, 129 Ohio St. 679, 3 Ohio Op. 63, 196 N.E. 424 (1935).

Continuance of government processes

United States government has power and duty to see that orderly processes of government continue and in so doing may pass laws and regulations necessary to carry out duty.

U.S.—U.S. v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

Exercise under General Welfare Clause

Under federal system, municipal or state police power having been lodged and reserved in state, a corresponding power in appropriate cases naturally arises under general welfare provision of Federal Constitution.

U.S.—Oklahoma City v. Sanders, 94 F.2d 323, 115 A.L.R. 363 (C.C.A. 10th Cir. 1938).

Incidents of state police power

That congressional exercise of constitutional power is attended by incidents which attend exercise of state police power is not ground for objection.

U.S.—Lambert v. Yellowley, 272 U.S. 581, 47 S. Ct. 210, 71 L. Ed. 422, 5 Ohio L. Abs. 88, 49 A.L.R. 575 (1926).

Power to protect its instrumentalities

Congress has power to protect instrumentalities which it has created.

U.S.—People of State of Cal. v. Coast Federal Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951).

12 N.Y.—People ex rel. Doscher v. Sisson, 180 A.D. 464, 167 N.Y.S. 801 (2d Dep't 1917), aff'd, 222 N.Y. 387, 118 N.E. 789 (1918).

Prevention of potential injury to national economy

Nothing in constitution prevents Congress from acting in time to prevent potential injury to national economy from becoming a reality.

U.S.—Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 12 A.L.R.2d 240 (7th Cir. 1948), judgment aff'd, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

13 U.S.—U.S. v. Timms, 664 F.3d 436 (4th Cir. 2012).

14 U.S.—U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986).

15 Vt.—Ex parte Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560 (1920).

Air space over private property

Sovereignty of the United States over higher air space does not authorize federal government in guise of police powers to interfere with lower air space over a private owner's property, the use of which is intrastate and necessary and beneficial to reasonable use of such property.

Cal.—Strother v. Pacific Gas & Elec. Co., 94 Cal. App. 2d 525, 211 P.2d 624 (3d Dist. 1949).

16 U.S.—Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 S. Ct. 106, 64 L. Ed. 194 (1919).

Effectuating enumerated powers

The federal government can exercise only the powers granted to it, including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers

U.S.—Bond v. U.S., 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).

17 U.S.—U.S. v. Fleish, 90 F. Supp. 273 (E.D. Mich. 1949).

18 Colo.—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

Minn.—State ex rel. Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350 (Minn. 2006).

Abridgement of police power by constitution

The "police power" of the Commonwealth, in the context of a constitutional provision prohibiting the abridgement of that power, is best described as the Commonwealth's inherent power, as a sovereign, to enact laws to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

Va.—Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

19 U.S.—Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934).

Cal.—Avco Community Developers, Inc. v. South Coast Regional Com., 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976).

N.Y.—DeLury v. City of New York, 51 A.D.2d 288, 381 N.Y.S.2d 236 (1st Dep't 1976).

Power not impaired by constitutional grants

Wash.—Snohomish County Builders Ass'n v. Snohomish Health Dist., 8 Wash. App. 589, 508 P.2d 617 (Div. 1 1973).

Contract for performance of functions

A governmental unit does not abdicate its police power by contracting with private persons to perform police power functions.

Ky.—Ward v. Louisville & N. R. Co., 402 S.W.2d 98 (Ky. 1966).

Interstate compact

Act ratifying and enacting into law the Water Sanitation Compact entered into by eight states to control pollution in river system is not invalid on ground that compact delegates police power of state to other states and to federal government.

U.S.—State ex rel. Dyer v. Sims, 341 U.S. 22, 71 S. Ct. 557, 95 L. Ed. 713, 62 Ohio L. Abs. 584 (1951).

20 U.S.—Bishop v. Oakstone Academy, 477 F. Supp. 2d 876, 218 Ed. Law Rep. 429 (S.D. Ohio 2007).

21 Fla.—Southern Utilities Co. v. City of Palatka, 86 Fla. 583, 99 So. 236 (1923), aff'd, 268 U.S. 232, 45 S. Ct. 488, 69 L. Ed. 930 (1925).

Mo.—State ex rel. Phillip v. Public School Retirement System of City of St. Louis, 364 Mo. 395, 262 S.W.2d 569 (1953).

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§ 705. Delegation of police power

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West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The police power may be exercised by subordinate government divisions to which it has been delegated by the State.

While a state may not bargain away its police power,[1] nor divest itself of its right and duty in respect of the full exercise of this power,[2] it may delegate the police power to other governmental subdivisions because these entities are part of the total government of the state.[3] Thus, the State may delegate police powers to subordinate agencies, instrumentalities, or authorities,[4] but such powers belong to the State and can be exercised by agencies of the State only under a delegation of authority.[5] Although the view has been followed that an agency of the State can exercise police powers only when such power has been expressly delegated to it,[6] according to other authority, a delegation of the police power will be implied when necessary to carry forward an enterprise of public interest and general welfare.[7]

The police power, if delegated, must define its purpose and the means of attainment thereof in language leaving no wide administrative discretion and no discretion at all in legislative matters.[8] Legislation vesting the policy power in subordinate agencies does not create any new obligations or duties or impose any new disabilities with reference to past transactions.[9]

The legislature may delegate a portion of its police power to counties and county officers[10] although an attempted delegation of such powers to some counties but not to others may be invalid.[11]

The legislature may authorize a particular administrative agency or board of officers to make reasonable police rules and regulations.[12] It cannot, however, abdicate its own police power on any subject and confer such power on a board to be exercised according to the uncontrolled discretion of such board.[13] Even so, the legislature is less restricted in its delegation of legislative authority to an administrative body created for the care of public health than it is for other created bodies.[14]

A state university or college may be a sufficiently public and state-connected entity to be viewed as a "state instrumentality" for the purposes of receiving the delegation of a state legislature's police power.[15]

Generally, a delegated police power may not be redelegated.[16]

The police power of the State cannot be delegated to private persons[17] or nonsovereign entities.[18]

Revocation of grant.

Under its police power, the State has the right to recall and to abrogate any powers previously conferred on any municipal corporation and to vest such powers in another and distinct state functionary.[19] In fact, according to some authority, such power may be exercised only under a delegation of authority which can be recalled by the State.[20]

Footnotes

1 U.S.—AT & T Corp. v. Lucas County, 381 F. Supp. 2d 714 (N.D. Ohio 2005).

2 Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

3 La.—Azalea Lakes Partnership v. Parish of St. Tammany, 859 So. 2d 57 (La. Ct. App. 1st Cir. 2003), writ denied, 858 So. 2d 429 (La. 2003).
Delegation of police power to municipalities, see § 706.

4 Fla.—State v. Holden, 299 So. 2d 8 (Fla. 1974).
Haw.—Hawaii Insurers Council v. Lingle, 120 Haw. 51, 201 P.3d 564 (2008).
Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).
Va.—Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955).
W. Va.—City of Huntington v. State Water Commission, 137 W. Va. 786, 73 S.E.2d 833 (1953).
Establishment of district
It is competent for legislature to authorize creation of governmental agencies for enforcement of police power, and clothe county commissioners, supervisors, or any other administrative officers or boards with authority to establish district for implementation of such purposes.
Neb.—Syfie v. Tri-County Hospital Dist., 186 Neb. 478, 184 N.W.2d 398 (1971).
Effect of constitution
Constitutional provision authorizing any county, city, town, or township to make local regulations not in conflict with general laws does not restrict legislature in delegating its power.
Wash.—Snohomish County Builders Ass'n v. Snohomish Health Dist., 8 Wash. App. 589, 508 P.2d 617 (Div. 1 1973).

5 Ky.—Bosworth v. City of Lexington, 277 Ky. 90, 125 S.W.2d 995 (1939).
La.—Fernandez v. Alford, 203 La. 111, 13 So. 2d 483 (1943).
Tex.—Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).

6 Tenn.—Lewis v. Nashville Gas & Heating Co., 162 Tenn. 268, 40 S.W.2d 409 (1931).

7 Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 204 Ind. 693, 184 N.E. 537 (1933).

Mo.—Kalbfell v. City of St. Louis, 357 Mo. 986, 211 S.W.2d 911 (1948).

8 Fla.—Lee v. Delmar, 66 So. 2d 252 (Fla. 1953).

Ill.—Routt v. Barrett, 396 Ill. 322, 71 N.E.2d 660 (1947).

Arbitrary discretion

An agency charged with duty of administering a statute enacted in pursuance of police power may be vested with a wide discretion, but discretion must not be arbitrary.

Vt.—State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939).

Notice and hearing

Although lawmaking body may make a legislative determination under police power, without notice and hearing to person affected, legislative body has no power to delegate to a board or an administrative officer its own power to act, without notice and hearing.

Va.—Assaid v. City of Roanoke, 179 Va. 47, 18 S.E.2d 287 (1942).

Standards

With respect to standards in legislation under police power, exception to requirement of specific standards is recognized where it is impossible or impractical to provide specific standards, and to do so would defeat legislature's object.

Ohio—Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 71 Ohio Op. 2d 366, 329 N.E.2d 693 (1975).

9 Me.—In re Searsport Water Co., 118 Me. 382, 108 A. 452 (1919).

10 Ga.—Vinson v. Howe Builders Ass'n of Atlanta, 233 Ga. 948, 213 S.E.2d 890 (1975).

Md.—Cox v. Board of Com'rs of Anne Arundel County, 181 Md. 428, 31 A.2d 179 (1943).

Ohio—McGowen v. Shaffer, 65 Ohio L. Abs. 138, 111 N.E.2d 615 (C.P. 1953).

11 S.C.—Owens v. Smith, 216 S.C. 382, 58 S.E.2d 332 (1950).

12 Conn.—Len-Lew Realty Co. v. Falsey, 141 Conn. 524, 107 A.2d 403 (1954).

Mo.—ABC Sec. Service, Inc. v. Miller, 514 S.W.2d 521 (Mo. 1974).

N.J.—In re Electrical Inspection Authorities, 127 N.J. Super. 295, 317 A.2d 373 (App. Div. 1974).

W. Va.—Mountaineer Disposal Service, Inc. v. Dyer, 156 W. Va. 766, 197 S.E.2d 111 (1973).

State department of labor's commencing of criminal charges for fraud

Haw.—Tauese v. State, Dept. of Labor and Indus. Relations, 113 Haw. 1, 147 P.3d 785 (2006), as corrected, (Nov. 21, 2006).

Building and zoning boards

Fla.—State v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931).

Power to determine facts

Legislature may delegate to an administrative officer power to determine specific facts on which an application of police power is made to depend.

Md.—Maryland Coal & Realty Co. v. Bureau of Mines of State, 193 Md. 627, 69 A.2d 471 (1949).

13 Ky.—Goodpaster v. Southern Ins. Agency, 293 Ky. 420, 169 S.W.2d 1 (1943).

N.Y.—Levine v. O'Connell, 275 A.D. 217, 88 N.Y.S.2d 672 (1st Dep't 1949), order aff'd, 300 N.Y. 658, 91 N.E.2d 322 (1950).

Constitutional power in legislative body

Ohio—Vandervort v. Sisters of Mercy of Cincinnati, 97 Ohio App. 153, 55 Ohio Op. 403, 66 Ohio L. Abs. 290, 117 N.E.2d 51 (1st Dist. Hamilton County 1952).

14 W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).

15 **Statewide jurisdiction given to university police force**

The state legislature conferred statewide authority on the police force for the University of Vermont and State Agricultural College (UVM); because UVM's public status made it a proper recipient of legislature's delegation of police power, the legislature was free to allocate statewide jurisdiction to UVM's police force.

Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

16 Okla.—Teeter v. City of Edmond, 2004 OK 5, 85 P.3d 817 (Okla. 2004).

17 Ill.—People ex rel. Gamber v. Sholem, 294 Ill. 204, 128 N.E. 377 (1920).

Mo.—State ex rel. Normandy Fire Protection Dist. v. Smith, 358 Mo. 572, 216 S.W.2d 440 (1948).

18 Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

19 Colo.—Berman v. City and County of Denver, 120 Colo. 218, 209 P.2d 754 (1949).
Ill.—Chicago, N.S. & M.R. Co. v. City of Chicago, 331 Ill. 360, 163 N.E. 141 (1928).
Ind.—Edwards v. Housing Authority of City of Muncie, 215 Ind. 330, 19 N.E.2d 741 (1939).

20 La.—Board of Com'rs of Orleans Levee Dist. v. Department of Natural Resources, 496 So. 2d 281 (La. 1986).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

B. Who May Exercise Power

§ 706. Delegation of police power—To municipalities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The police power of the states may, in the absence of any constitutional restrictions on the subject, be delegated to the various municipalities throughout the state.

The police power of a state may, in the absence of any constitutional restrictions on the subject,[1] be delegated to the various municipalities throughout the state,[2] when necessary,[3] to be exercised by them within their respective corporate limits,[4] or even beyond, where expressly authorized by a statute or charter.[5]

Statutes conferring the police power on municipalities should be construed so as not to authorize an unreasonable exercise thereof.[6] It is not necessary that the police power should be granted to municipalities in express words, for by the organization of a city or borough within its borders the state imparts the powers necessary to the performance of its functions, including the police power.[7]

Bargaining away police power.

A municipality may not bargain away its police power.[8]

Footnotes

1 Neb.—Chicago, B. & Q.R. Co. v. State, 47 Neb. 549, 66 N.W. 624 (1896), aff'd, 170 U.S. 57, 18 S. Ct. 513, 42 L. Ed. 948 (1898).

2 U.S.—Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922).
La.—Azalea Lakes Partnership v. Parish of St. Tammany, 859 So. 2d 57 (La. Ct. App. 1st Cir. 2003), writ denied, 858 So. 2d 429 (La. 2003).
N.C.—Treants Enterprises, Inc. v. Onslow County, 320 N.C. 776, 360 S.E.2d 783 (1987).
Utah—Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654 and 2064, 563 P.2d 786 (Utah 1977).
Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).
W. Va.—Bittinger v. Corporation of Bolivar, 183 W. Va. 310, 395 S.E.2d 554 (1990).
Guides and standards
In a delegation of police power to municipality, guides and standards need not be spelled out.
Md.—Bender v. Arundel Arena, Inc., 248 Md. 181, 236 A.2d 7 (1967).
Subjects within state laws
Legislature may confer on municipality police power over subjects also within provisions of state laws.
N.Y.—People v. Moreira, 70 Misc. 2d 68, 333 N.Y.S.2d 215 (Dist. Ct. 1972).

3 N.C.—Treants Enterprises, Inc. v. Onslow County, 320 N.C. 776, 360 S.E.2d 783 (1987).

4 Ohio—Hickey v. Burke, 78 Ohio App. 351, 34 Ohio Op. 82, 46 Ohio L. Abs. 183, 69 N.E.2d 33 (8th Dist. Cuyahoga County 1946).
S.C.—Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943).
Tex.—City of Coleman v. Rhone, 222 S.W.2d 646 (Tex. Civ. App. Eastland 1949), writ refused.

5 N.D.—Waslien v. City of Hillsboro, 48 N.D. 1113, 188 N.W. 738 (1922).
Tex.—Treadgill v. State, 160 Tex. Crim. 658, 275 S.W.2d 658 (1954).
Contiguous territory
Legislature has authority to confer on municipality jurisdiction for sanitary and police purposes in territory contiguous to corporation.
N.C.—Holmes v. City of Fayetteville, 197 N.C. 740, 150 S.E. 624 (1929).
City's property situated outside city
Legislature has power to confer on cities power to exercise police jurisdiction over properties belonging to city situated outside and beyond general police jurisdiction of city.
Ala.—City of Birmingham v. Lake, 243 Ala. 367, 10 So. 2d 24 (1942).

6 Mo.—Turner v. Kansas City, 354 Mo. 857, 191 S.W.2d 612 (1945).
S.C.—City of Sioux Falls v. Peterson, 71 S.D. 446, 25 N.W.2d 556 (1946).
W. Va.—Carter v. City of Bluefield, 132 W. Va. 881, 54 S.E.2d 747 (1949).

7 Ind.—Connersville Hydraulic Co. v. City of Connersville, 95 Ind. App. 234, 173 N.E. 641 (1930).
Mo.—Turner v. Kansas City, 354 Mo. 857, 191 S.W.2d 612 (1945).
Tex.—City of Beaumont v. Priddie, 65 S.W.2d 434 (Tex. Civ. App. Austin 1933), rev'd on other grounds, 127 Tex. 629, 95 S.W.2d 1290 (Comm'n App. 1936).

8 U.S.—AT & T Corp. v. Lucas County, 381 F. Supp. 2d 714 (N.D. Ohio 2005).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

C. Public Interests Served and Subjects Regulated

Topic Summary | Correlation Table

Research References

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A.L.R. Index, Police Power
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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C. Public Interests Served and Subjects Regulated

§ 707. Subjects regulated by police power, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The quality and content of the police power are determined by the end to be served and the nature of the subject matter.

The quality and content of the police power are determined by the end to be served by its exercise and by the subject matter to which it is applied for that purpose.[1] The police power is exercised out of public necessity,[2] and the securing of the general welfare, comfort, and convenience of the people is the real object of the police power.[3] In the absence of organic restraint, the legislative power may, for the general welfare of society, impose obligations and responsibilities otherwise nonexistent.[4] In any police power measure, the legislative body may strike at the evil where it deems it worst, and it need not root out all harms in order to validly proscribe some.[5]

The exercise of the police power to protect the general or public welfare includes the protection of life and limb,[6] of public property,[7] of the welfare of the public in the future,[8] of the economic welfare of the people generally,[9] and the preservation of exhaustible, natural resources.[10] The police power to legislate for the general welfare embraces regulations designed to promote the public convenience or the general prosperity.[11]

It is the right and duty of a state possessing the police power to pass such laws as may be necessary for the preservation of public health.[12] Action by the State in the interest of the public safety is within the proper exercise of the police power[13] as by the regulations concerning dangerous persons, restraining dangerous practices, and prohibiting dangerous structures.[14] The State's inherent sovereign power includes the so-called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, and general well-being of the people.[15] For the legislature to enact a valid statute pursuant to its police power, however, it may be necessary for the threat to be imminently dangerous.[16] The police power relates not merely to public physical safety but also to public financial safety, and laws may be passed within the police power to protect the public from financial loss.[17]

In the exercise of the police power, legislatures may enact all laws necessary for the preservation of the rights of person and property from unlawful violence and disorder[18] and the maintenance of good order throughout the state.[19] In fact, there is no better example of the police power, which is reposed in the states, than the suppression of violent crime and vindication of its victims.[20] The state legislature's efforts to protect the safety of public school children and maintain order in the classrooms are within the State's police powers.[21]

Prevention of fraud.

Enactment of statutes having for their object the prevention of fraud,[22] deception,[23] deceit,[24] cheating, and imposition[25] is within the police power of the State.The power to prohibit fraud is broad.[26]

Gathering and preserving evidence.

The gathering and preserving of evidence is a police power function necessary for the safety and general welfare of society.[27]

Footnotes

1 N.J.—Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 75 A.2d 867, 22 A.L.R.2d 929 (1950).

2 Ark.—Craighead Elec. Co-op. Corp. v. Craighead County, 352 Ark. 76, 98 S.W.3d 414 (2003).

3 U.S.—Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952).
Kan.—State ex rel. Stephan v. Lane, 228 Kan. 379, 614 P.2d 987 (1980).
Miss.—Great South Fair v. City of Petal, 548 So. 2d 1289 (Miss. 1989).
Mont.—State v. Turk, 197 Mont. 311, 643 P.2d 224 (1982).

4 U.S.—City of Chicago v. Sturges, 222 U.S. 313, 32 S. Ct. 92, 56 L. Ed. 215 (1911).
Cal.—Sandstrom v. California Horse Racing Bd., 31 Cal. 2d 401, 189 P.2d 17, 3 A.L.R.2d 90 (1948).

5 N.J.—Singer v. Township of Princeton, 373 N.J. Super. 10, 860 A.2d 475 (App. Div. 2004).

6 Cal.—Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P.2d 1054 (1938).
A.L.R. Library
Validity of State Gun Control Legislation Under State Constitutional Provisions Securing Right to Bear Arms—Convicted Felons, 85 A.L.R.6th 641.
Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

7 Nev.—State v. Eight Judicial Dist. Court, In and For State, Clark County, 101 Nev. 658, 708 P.2d 1022 (1985).
S.D.—Clem v. City of Yankton, 83 S.D. 386, 160 N.W.2d 125 (1968).

Wis.—State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).

A.L.R. Library

Validity and construction of statute or ordinance protecting historical landmarks, 18 A.L.R.4th 990.

8 N.Y.—Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 (1938).

9 Fla.—Florida Dept. of Agriculture and Consumer Services v. Haire, 836 So. 2d 1040 (Fla. 4th DCA 2003), decision approved, 870 So. 2d 774 (Fla. 2004).

La.—Vonderhaar v. Parish of St. Tammany, 633 So. 2d 217 (La. Ct. App. 1st Cir. 1993).

Wyo.—State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938).

Right of engaging in, or regulating, lawful business or occupation under the police power, generally, see § 710.

A.L.R. Library

Validity of statute abolishing commercial bail bond business, 19 A.L.R.4th 355.

10 Ga.—Whipple v. City of Cordele, 231 Ga. App. 274, 499 S.E.2d 113 (1998).

Md.—Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972).

Miss.—Masonite Corp. v. State Oil and Gas Bd., 240 So. 2d 446 (Miss. 1970).

Oil and gas

Okla.—Wickham v. Gulf Oil Corp., 1981 OK 8, 623 P.2d 613 (Okla. 1981).

Allocation and conservation

States have power to allocate and conserve scarce natural resources upon and beneath their lands.

U.S.—Northern Natural Gas Co. v. State Corp. Commission of Kan., 372 U.S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963).

11 Pa.—Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901 (2013).

12 Ala.—Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263 (Ala. 1981).

Ill.—People v. Tolbert, 354 Ill. App. 3d 94, 289 Ill. Dec. 498, 820 N.E.2d 6 (1st Dist. 2004).

Iowa—Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004).

N.Y.—St. Joseph Hosp. of Cheektowaga v. Novello, 15 Misc. 3d 333, 828 N.Y.S.2d 877 (Sup 2007), aff'd as modified, 43 A.D.3d 139, 840 N.Y.S.2d 263 (4th Dep't 2007).

Pa.—Diwara v. State Board of Cosmetology, 852 A.2d 1279 (Pa. Commw. Ct. 2004).

Environmental protection

U.S.—Pure Wafer, Inc. v. City of Prescott, 14 F. Supp. 3d 1279 (D. Ariz. 2014).

Hospitals

Promotion and protection of public health is a proper subject for exercise of police power of State, and hospitals, whether publicly or privately owned, are operated for that purpose and subject to state regulation.

N.C.—Foster v. North Carolina Medical Care Commission, 283 N.C. 110, 195 S.E.2d 517 (1973).

Treatment for diseases

It is within police power of state to provide treatment for infections and contagious diseases which if not treated can become epidemic.

N.C.—Graham v. Reserve Life Ins. Co., 274 N.C. 115, 161 S.E.2d 485 (1968).

13 U.S.—Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946).

Minn.—Pomrenke v. Commissioner of Commerce, 677 N.W.2d 85 (Minn. Ct. App. 2004).

Miss.—PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).

Wis.—State v. Cole, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).

Environmental protection

U.S.—Pure Wafer, Inc. v. City of Prescott, 14 F. Supp. 3d 1279 (D. Ariz. 2014).

Safe travel

Police power of State is broad enough to sustain promulgation and fair enforcement of laws designed to restore right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition.

N.C.—Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618 (2007), decision aff'd, 362 N.C. 328, 661 S.E.2d 728 (2008).

Canvassing and solicitation

Door-to-door canvassing and solicitation are not immune from regulation under State's police power, whether purpose of regulation is to protect from danger or to protect peaceful enjoyment of home.

U.S.—Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

A.L.R. Library

Validity, construction, and effect of juvenile curfew regulations, 83 A.L.R.4th 1056.

14 U.S.—Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

Ga.—Vinson v. Howe Builders Ass'n of Atlanta, 233 Ga. 948, 213 S.E.2d 890 (1975).

Iowa—Green v. Shama, 217 N.W.2d 547 (Iowa 1974).

Aviation

Ill.—People ex rel. Greening v. Bartholf, 388 Ill. 445, 58 N.E.2d 172 (1944).

Emergency demolition of buildings

N.Y.—Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006).

Prohibiting carrying dangerous weapons

Kan.—State v. Neighbors, 21 Kan. App. 2d 824, 908 P.2d 649 (1995).

Protection from dangerous persons

U.S.—Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

Protection of school children

Ala.—McCraney v. City of Leeds, 241 Ala. 198, 1 So. 2d 894 (1941).

Present dangerous condition from past activities

Fact that property's present dangerous condition arises only from past activities does not affect appropriateness of invoking police power to dispel that immediately dangerous condition.

Pa.—Com., Dept. of Transp. v. Longo, 98 Pa. Commw. 120, 510 A.2d 832 (1986), order aff'd, 512 Pa. 639, 518 A.2d 265 (1986).

15 Cal.—In re Marriage of Kelkar, 229 Cal. App. 4th 833, 176 Cal. Rptr. 3d 905 (2d Dist. 2014).

16 Fla.—Haire v. Florida Dept. of Agriculture and Consumer Services, 870 So. 2d 774 (Fla. 2004).

Immediate threat to safety of general public

Mo.—State ex rel. Koster v. Morningland of the Ozarks, LLC, 384 S.W.3d 346 (Mo. Ct. App. S.D. 2012).

17 Colo.—Zeigler v. People, 109 Colo. 252, 124 P.2d 593 (1942).

Ill.—Sherman-Reynolds, Inc. v. Mahin, 47 Ill. 2d 323, 265 N.E.2d 640 (1970).

Tex.—Majestic Industries, Inc. v. St. Clair, 537 S.W.2d 297 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Nov. 17, 1976).

No-fault auto insurance

Where it was within province of legislature to create alternative remedies to right to recover for injuries resulting from negligent operation of an automobile, and remedies provided by no-fault motor vehicle insurance act partially replacing such right were reasonable, requiring all private passenger vehicle owners to carry basic security was within police power of legislature.

Conn.—Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1 (1975).

18 U.S.—Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

Pa.—Com. v. Mastrangelo, 489 Pa. 254, 414 A.2d 54 (1980).

Va.—Blue Cross of Virginia v. Com., 221 Va. 349, 269 S.E.2d 827 (1980).

Regulation of appropriation of surface water

U.S.—Keating v. Nebraska Public Power Dist., 713 F. Supp. 2d 849 (D. Neb. 2010), aff'd, 660 F.3d 1014 (8th Cir. 2011).

Avoidance of infringement of rights

Where there exists an appropriate remedy to protect public peace and order which does not infringe constitutional rights, it should be used in preference to another remedy which may interfere with such rights.

U.S.—National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1964).

Future actions

Threatened disorders are equally subject to the police power as are actual disturbances of the public peace.

U.S.—Cantwell v. State of Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).

Orderly government

Generally, orderly government is legitimate object for state's exercise of police power.

Ohio—State v. Mitchell, 32 Ohio App. 2d 16, 61 Ohio Op. 2d 9, 288 N.E.2d 216 (10th Dist. Franklin County 1972).

Public places

The State has a paramount duty to maintain order not only in the streets but in schools, hospitals, and other public places.

N.C.—State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

19 Ga.—State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000).

Mass.—Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

A.L.R. Library

Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1.

20 U.S.—U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

21 U.S.—J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).

N.J.—Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009).

22 Mo.—City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005).

N.M.—State ex rel. Stratton v. Sinks, 106 N.M. 213, 1987-NMCA-092, 741 P.2d 435 (Ct. App. 1987).

Va.—Mar v. Malveaux, 60 Va. App. 759, 732 S.E.2d 733 (2012).

23 N.M.—State ex rel. Stratton v. Sinks, 106 N.M. 213, 1987-NMCA-092, 741 P.2d 435 (Ct. App. 1987).

24 Kan.—Kansas State Bd. of Pharmacy v. Wilson, 8 Kan. App. 2d 359, 657 P.2d 83 (1983).

25 Ill.—Brennan v. Illinois Racing Bd., 42 Ill. 2d 352, 247 N.E.2d 881 (1969).

Iowa—State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971).

N.C.—Heritage Village Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Va.—Mar v. Malveaux, 60 Va. App. 759, 732 S.E.2d 733 (2012).

Consumer protection

Enactment of statute designed to prevent deception of consumers of particular goods constitutes valid exercise of State's police power.

Tex.—Majestic Industries, Inc. v. St. Clair, 537 S.W.2d 297 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Nov. 17, 1976).

Incomplete disclosure

Power of State to provide for general welfare authorizes it to establish such regulations as will secure or attempt to secure the people against ignorance often due from incomplete disclosure of facts by one in unique position to know the facts.

U.S.—U. S. ex rel. Shott v. Tehan, 365 F.2d 191, 9 Ohio Misc. 135, 37 Ohio Op. 2d 341, 38 Ohio Op. 2d 244 (6th Cir. 1966).

26 U.S.—Buffo v. Graddick, 742 F.2d 592 (11th Cir. 1984).

27 Wash.—Eggleston v. Pierce County, 148 Wash. 2d 760, 64 P.3d 618 (2003).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

C. Public Interests Served and Subjects Regulated

§ 708. Public morals

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The police power may be exerted to preserve and protect public morals.

The police power may be exerted to preserve and protect public morals,[1] as by regulating or preventing such acts, practices, and occupations as are in themselves immoral or indecent or as have a tendency to promote immorality and indecency[2] or to corrupt the morals of those who follow such practices or to encourage idleness instead of habits of industry.[3]

The State may destroy whatever tends to undermine public morals,[4] and accordingly, it is within the police power of the State to provide for the forfeiture, or even the destruction, of illegal instrumentalities used in the perpetration of an offense in violation of criminal statutes.[5]

Footnotes

1 Cal.—Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 125 Cal. Rptr. 2d 561 (4th Dist. 2002).
Ill.—Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 286 Ill. Dec. 566, 814 N.E.2d 216 (4th Dist. 2004), judgment aff'd, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005).
Minn.—Pomrenke v. Commissioner of Commerce, 677 N.W.2d 85 (Minn. Ct. App. 2004).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).
Okla.—Okfuskee County Rural Water Dist. No. 3 v. City of Okemah, 2011 OK CIV APP 65, 257 P.3d 1011 (Div. 3 2011).

2 Ga.—Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).
Va.—Blue Cross of Virginia v. Com., 221 Va. 349, 269 S.E.2d 827 (1980).
Wash.—City of Seattle v. Buchanan, 90 Wash. 2d 584, 584 P.2d 918 (1978).
Sale of alcoholic beverages
U.S.—181 South Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006).
Right of individual
With respect to regulation of morals, police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce majority morality on persons whose conduct does not harm others.
Pa.—Com. v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).
A.L.R. Library
Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.
Validity, construction, and effect of statutes, ordinances, or regulations prohibiting or regulating advertising of intoxicating liquors, 20 A.L.R.4th 600.

3 N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

4 Miss.—Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950).
Nev.—Park v. State, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75 (1919).
N.J.—Brown v. Township of Old Bridge, 319 N.J. Super. 476, 725 A.2d 1154 (App. Div. 1999).

5 Kan.—State v. Peterson, 107 Kan. 641, 193 P. 342 (1920).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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§ 709. Esthetic conditions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

A state may legitimately exercise its police powers to advance or uphold esthetic values provided it meets the test of reasonableness.

The concept of the public welfare is broad and inclusive,[1] representing values that are spiritual as well as physical, esthetic, as well as monetary.[2] It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[3] Thus, the view has sometimes been followed that a state may legitimately exercise its police powers to advance or uphold esthetic values[4] provided it meets the test of reasonableness.[5] According to other authority, however, esthetic conditions alone are insufficient to support the invocation of the police power.[6] Even so, if a regulation finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that esthetic considerations play a part in its adoption does not affect its validity.[7]

Footnotes

1 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
Cal.—Kucera v. Lizza, 59 Cal. App. 4th 1141, 69 Cal. Rptr. 2d 582 (1st Dist. 1997).
Conn.—Cohen v. City of Hartford, 244 Conn. 206, 710 A.2d 746 (1998).
Ky.—Hendricks v. Com., 865 S.W.2d 332 (Ky. 1993).

2 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
Conn.—Cohen v. City of Hartford, 244 Conn. 206, 710 A.2d 746 (1998).
Cal.—Kucera v. Lizza, 59 Cal. App. 4th 1141, 69 Cal. Rptr. 2d 582 (1st Dist. 1997).
Ky.—Hendricks v. Com., 865 S.W.2d 332 (Ky. 1993).
Regulation of signs
U.S.—Verizon New York Inc. v. Village of Westhampton Beach, 2014 WL 2711846 (E.D. N.Y. 2014).
Historic preservation
La.—Apasra Properties, LLC v. City of New Orleans, 31 So. 3d 615 (La. Ct. App. 4th Cir. 2010).
Preservation of architecturally or historically significant areas
Md.—Casey v. Mayor and City Council of Rockville, 400 Md. 259, 929 A.2d 74 (2007).
Architectural, historical, and esthetic values
N.Y.—Manhattan Club v. Landmarks Preservation Commission of City of New York, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup 1966).
Advancement of esthetic values
State may legitimately exercise its police powers to advance esthetic values.
U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).
Environmental matters
It is within power of state and municipal governments to consider esthetic and environmental values.
Ill.—Rent-A-Sign v. City of Rockford, 85 Ill. App. 3d 453, 40 Ill. Dec. 740, 406 N.E.2d 943 (2d Dist. 1980).

3 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
Idaho—Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977).
Tenn.—State v. Smith, 618 S.W.2d 474 (Tenn. 1981).
Right to clean, healthy, and aesthetically pleasing environment
Pa.—Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901 (2013).
Constitution construed
Provision in state constitution that state shall have power to conserve and develop its natural beauty, sightliness, and physical good order is applicable to industrial area.
Haw.—State v. Diamond Motors, Inc., 50 Haw. 33, 429 P.2d 825 (1967).
A.L.R. Library
Validity of State or Local Enactment Regulating Sound Amplification in Public Area, 122 A.L.R.5th 593.
Validity, Construction, and Application of Zoning Ordinances Regulating Display of Noncommercial Flags or Banners, 103 A.L.R.5th 445.

4 U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); Lusk v. Village of Cold Spring, 475 F.3d 480 (2d Cir. 2007); Johnson v. City and County of Philadelphia, 665 F.3d 486 (3d Cir. 2011); Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006).
Cal.—Kucera v. Lizza, 59 Cal. App. 4th 1141, 69 Cal. Rptr. 2d 582 (1st Dist. 1997).
N.Y.—Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977).
Historic district
The interest of a state in exercising its police powers or advance esthetic values is even stronger in an historic district.
U.S.—Riel v. City of Bradford, 485 F.3d 736 (3d Cir. 2007).

5 U.S.—Quality Built Homes, Inc. v. Village of Pinehurst, 2008 WL 3503149 (M.D. N.C. 2008).
Zoning based merely on aesthetic interests
U.S.—Southeast Towers, LLC v. Pickens County, Ga., 625 F. Supp. 2d 1293 (N.D. Ga. 2008).
Bearing on patterns of community

Regulation in name of aesthetics must bear substantially on economic, social, and cultural patterns of community or district.

N.Y.—People v. Goodman, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972).

Immediate implementation

In contrast to a safety-motivated exercise of police power, a regulation enacted to enhance esthetics of community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses.

N.Y.—Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977).

6 Conn.—Gionfriddo v. Town of Windsor, 137 Conn. 701, 81 A.2d 266 (1951).

Ohio—State v. Buckley, 16 Ohio St. 2d 128, 45 Ohio Op. 2d 469, 243 N.E.2d 66 (1968).

Wash.—Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

Scenic beauty of private property

Considerations of public welfare involved in preservation of scenic beauty of private property are not such as to give constitutional warrant to legislative interference with otherwise lawful use by an owner.

U.S.—Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S.D. Cal. 1946).

7 Me.—Ace Tire Co., Inc. v. Municipal Officers of City of Waterville, 302 A.2d 90 (Me. 1973).

N.Y.—Town of Vestal v. Bennett, 199 Misc. 41, 104 N.Y.S.2d 830 (Sup 1950).

Wash.—Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

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16A C.J.S. Constitutional Law § 710

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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§ 710. Businesses and occupations; property

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
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The right of engaging in, or regulating, a lawful business or occupation is subject to regulation under the police power.

Within extremely broad limits, a state legislature may control practices in the business-labor field, as long as specific constitutional prohibitions are not violated, and as long as conflicts with valid and controlling federal laws are avoided,[1] and states have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs.[2] The states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce may be affected.[3]

The right of engaging in, or regulating, a lawful business or occupation is subject to regulation under the police power,[4] even though a profitable business incidentally is impaired or destroyed,[5] pecuniary losses are sustained,[6] or the activities of persons not engaged in the regulated business are incidentally restricted.[7]

The right to labor and the right to enjoy the rewards thereof may not be unreasonably interfered with by legislation;[8] and the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it.[9] Thus, it is beyond the police power to prohibit persons from engaging in the common business occupations or employments that are innocent and lawful in themselves and that do not require the exercise of any special skill.[10] As to such occupations, the scope of the police power is confined to the enactment of regulations to promote the public health, safety, and welfare.[11]

A state may not, under the guise of protecting the public, arbitrarily interfere with or prohibit private businesses or lawful occupations.[12] Any regulation must be reasonable in its nature and adapted to the accomplishment of the avowed purposes.[13] Public concern for the maintenance of a particular business is not enough to justify regulatory legislation and supervision; the public must have an interest in the use calling for public regulation to serve that interest.[14]

Where the pursuit concerns, in a direct manner, the public health and welfare and is of such a character as to require a special course of study or training or experience to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the legislature to enact reasonable regulations to protect the public against the evils which may result from incapacity and ignorance[15] and even to limit the pursuit of such occupations to persons who have been found to possess a prescribed degree of knowledge or skill.[16] Thus, the right to pursue a profession is subject to the paramount right of the State under its police powers to regulate business and professions in order to protect the public health, morals, and welfare,[17] and such regulations do not violate due process.[18]

A state may, in the exercise of police power, prohibit any business dangerous to the public safety.[19] The power of the State to regulate occupations and business is not based exclusively on its authority to prevent and abate nuisances.[20] A business or occupation is not exempt from regulation by the mere fact that it is lawful[21] or that its exercise or conduct does not constitute a nuisance per se, that is, interference so severe that it constitutes a nuisance under any circumstances.[22]

It is within the province of the police power to regulate all professions, trades, occupations, and business enterprises that are of a quasi-public nature or vested with a public interest or that may, if exercised or conducted without restriction, prove injurious to the public health, safety, or morals, or to the general welfare,[23] and it is not always essential that a business be wholly affected with a public interest to be subject to regulation.[24]

To the extent that property or business is devoted to the public use or is affected with a public interest, it is subject to regulation under the police power.[25] The right of private property does not include the right to use it in a manner injurious to the public, and all such uses may be forbidden,[26] and whenever a state determines, in good faith, that a practice of an industry is injurious to the public, the State may control the practice.[27] There is no constitutional right to conduct a business so as to injure the public.[28]

Due to an emergency, rental conditions of private property have been held a proper subject for the exercise of the police power.[29]

Footnotes

1 U.S.—Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952).
Wis.—State v. Amoco Oil Co., 97 Wis. 2d 226, 293 N.W.2d 487 (1980).
Protection of employees and their dependents
U.S.—Albrecht v. Pneuco Machinery Co., 448 F. Supp. 851 (E.D. Pa. 1978).

2 U.S.—Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

Unauthorized practice of law

Cal.—Fink v. Shemtov, 210 Cal. App. 4th 599, 148 Cal. Rptr. 3d 570 (4th Dist. 2012), review denied, (Jan. 3, 2013).

Prohibition

Harmful business pursuits can be duly prohibited as well as regulated under police power.

Cal.—Harriman v. City of Beverly Hills, 275 Cal. App. 2d 918, 80 Cal. Rptr. 426, 35 A.L.R.3d 1421 (2d Dist. 1969).

3 U.S.—Chinatown Neighborhood Association v. Harris, 33 F. Supp. 3d 1085 (N.D. Cal. 2014).

Ala.—Opinion of the Justices, 49 So. 3d 1181 (Ala. 2010).

4 U.S.—Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Cal.—Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 127 Cal. Rptr. 3d 185, 254 P.3d 237 (2011).

Del.—Klig v. Deloitte LLP, 36 A.3d 785 (Del. Ch. 2011).

D.C.—Bergman v. District of Columbia, 986 A.2d 1208 (D.C. 2010).

Gambling

U.S.—Caesars Massachusetts Management Co., LLC v. Crosby, 778 F.3d 327 (1st Cir. 2015).

Hours of business

Mich.—People v. Raub, 9 Mich. App. 114, 155 N.W.2d 878 (1967).

State engaging in business

Police power, as applied to business activities, is power to regulate them as distinguished from power to engage in them.

U.S.—State of Ohio v. Helvering, 292 U.S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934).

Employment standards

Employment standards fall squarely within traditional police powers of states and as such should not be disturbed lightly.

U.S.—Ulysse v. AAR Aircraft Component Services, 841 F. Supp. 2d 659 (E.D. N.Y. 2012).

5 U.S.—Comtronics, Inc. v. Puerto Rico Telephone Co., 409 F. Supp. 800 (D.P.R. 1975), judgment aff'd, 553 F.2d 701 (1st Cir. 1977).

Ky.—Boyle County Stockyards Co. v. Com., Dept. of Agriculture, 570 S.W.2d 650 (Ky. Ct. App. 1978).

Tex.—Majestic Industries, Inc. v. St. Clair, 537 S.W.2d 297 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Nov. 17, 1976).

6 U.S.—L'Hote v. City of New Orleans, 177 U.S. 587, 20 S. Ct. 788, 44 L. Ed. 899 (1900).

Cal.—Knudsen Creamery Co. of Cal. v. Brock, 37 Cal. 2d 485, 234 P.2d 26 (1951).

Ill.—Du Page County v. Henderson, 402 Ill. 179, 83 N.E.2d 720 (1949).

Cost of doing business increased

N.Y.—People v. Cunard White Star, 280 N.Y. 413, 21 N.E.2d 489 (1939).

7 Tex.—Andrada v. City of San Antonio, 555 S.W.2d 488 (Tex. Civ. App. San Antonio 1977), dismissed, (Nov. 30, 1977).

8 Colo.—Battaglia v. Moore, 128 Colo. 326, 261 P.2d 1017 (1953).

Ky.—Ratliff v. Hill, 293 Ky. 36, 168 S.W.2d 336, 145 A.L.R. 754 (1943).

9 N.C.—State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

N.D.—State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943).

10 Idaho—Berry v. Summers, 76 Idaho 446, 283 P.2d 1093 (1955).

Ill.—Figura v. Cummins, 4 Ill. 2d 44, 122 N.E.2d 162 (1954).

Business practices without detrimental effect

Mich.—Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80 (1951).

Prohibition power not implied

Wash.—State ex rel. Thornbury v. Gregory, 191 Wash. 70, 70 P.2d 788 (1937).

Prohibition of sale of harmless product

Mich.—Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N.W. 608 (1936).

11 U.S.—Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (1937).

N.C.—Heritage Village Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

N.D.—Bob Rosen Water Conditioning Co. v. City of Bismarck, 181 N.W.2d 722 (N.D. 1970).

Okla.—Semke v. State ex rel. Oklahoma Motor Vehicle Commission, 1970 OK 15, 465 P.2d 441 (Okla. 1970).

Effect on incidental features

When it becomes established that a business is subject to legislative regulation because affected with a public interest and devoted to a public use, incidental and accessory features, reasonable in scope and fair in aim, fall under the same rule.

U.S.—Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90 (S.D. Cal. 1935).

12 U.S.—Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A.L.R. 661 (1924).

Ky.—Minor v. Stephens, 898 S.W.2d 71 (Ky. 1995).

Neb.—U.S. Brewers' Ass'n, Inc. v. State, 192 Neb. 328, 220 N.W.2d 544 (1974).

Compulsory medical malpractice insurance

Ky.—McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977).

Choice of prohibition or regulation

Law does not tolerate prohibition of something which may be regulated in such a way as to overcome any evils which may be incidentally connected with it.

Vt.—Tosi v. Board of Medical Registration, 128 Vt. 26, 258 A.2d 581 (1969).

Regulation of hours

That community might otherwise be forced to expend additional resources to provide adequate police protection is no justification for closing otherwise harmless businesses.

N.J.—Fasino v. Mayor and Members of Borough Council of Borough of Montvale, 122 N.J. Super. 304, 300 A.2d 195 (Law Div. 1973), judgment aff'd, 129 N.J. Super. 461, 324 A.2d 77 (App. Div. 1973).

13 N.J.—Troy Hills Village, Inc. v. Fischler, 122 N.J. Super. 572, 301 A.2d 177 (Law Div. 1971), judgment aff'd, 122 N.J. Super. 525, 301 A.2d 153 (App. Div. 1973).

Ohio—Auto Reality Service, Inc. v. Brown, 27 Ohio App. 2d 77, 56 Ohio Op. 2d 253, 272 N.E.2d 642 (10th Dist. Franklin County 1971).

Sunday closing law

Ill.—Opyt's Amoco, Inc. v. Village of South Holland, 209 Ill. App. 3d 473, 154 Ill. Dec. 260, 568 N.E.2d 260 (1st Dist. 1991), judgment aff'd, 149 Ill. 2d 265, 172 Ill. Dec. 390, 595 N.E.2d 1060 (1992).

14 N.J.—Lane Distributors v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951).

15 U.S.—Sims v. Tinney, 482 F. Supp. 794 (D.S.C. 1977), aff'd, 615 F.2d 1358 (4th Cir. 1979).

Wis.—Laufenberg v. Cosmetology Examining Bd. of Wisconsin Dept. of Regulation and Licensing, 87 Wis. 2d 175, 274 N.W.2d 618 (1979).

Regulation not mandated by constitution

U.S.—Stephens v. Dennis, 293 F. Supp. 589 (N.D. Ala. 1968).

Profession singled out

Fact that particular profession has been singled out as first of its kind to be subjected to pervasive regulation does not make that choice improper exercise of police power.

N.J.—New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 384 A.2d 795 (1978).

16 U.S.—Dent v. State of W.Va., 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889).

Fla.—Florida Hearing Aid Soc., Inc. v. State, Dept. of Health and Rehabilitative Services, 399 So. 2d 1035 (Fla. 1st DCA 1981), dismissed, 411 So. 2d 382 (Fla. 1981).

Ill.—People ex rel. Illinois State Dental Soc. v. Sutker, 76 Ill. App. 3d 240, 32 Ill. Dec. 67, 395 N.E.2d 14 (1st Dist. 1979).

17 Ariz.—Comeau v. Arizona State Bd. of Dental Examiners, 196 Ariz. 102, 993 P.2d 1066 (Ct. App. Div. 1 1999).

N.M.—Mills v. New Mexico State Bd. of Psychologist Examiners, 1997-NMSC-028, 123 N.M. 421, 941 P.2d 502 (1997).

Pa.—Pennsylvania Medical Soc. v. Foster, 147 Pa. Commw. 528, 608 A.2d 633 (1992).

18 N.M.—Mills v. New Mexico State Bd. of Psychologist Examiners, 1997-NMSC-028, 123 N.M. 421, 941 P.2d 502 (1997).

19 Mich.—Stockler v. State, Dept. of Treasury, 75 Mich. App. 640, 255 N.W.2d 718 (1977).

Nev.—State ex rel. List v. AAA Auto Leasing & Rental, Inc., 93 Nev. 483, 568 P.2d 1230 (1977).

Wis.—Laufenberg v. Cosmetology Examining Bd. of Wisconsin Dept. of Regulation and Licensing, 87 Wis. 2d 175, 274 N.W.2d 618 (1979).

20 U.S.—Munn v. People of State of Illinois, 94 U.S. 113, 24 L. Ed. 77, 1876 WL 19615 (1876).

Ark.—City of Little Rock v. Reinman, 107 Ark. 174, 155 S.W. 105 (1913), aff'd, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915).

Preventing and abating nuisances, generally, see C.J.S., Nuisances §§ 1 et seq.

21 D.C.—U. S. v. Moses, 339 A.2d 46 (D.C. 1975).

N.D.—Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978).

Nev.—Koscot Interplanetary, Inc. v. Draney, 90 Nev. 450, 530 P.2d 108 (1974).

22 Cal.—Ex parte Hadacheck, 165 Cal. 416, 132 P. 584 (1913), aff'd, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).

Conn.—Levine v. Board of Adjustment of City of New Britain, 125 Conn. 478, 7 A.2d 222 (1939).

23 Iowa—Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).

N.J.—Application of Martin, 90 N.J. 295, 447 A.2d 1290 (1982).

Energy generation

N.C.—State ex rel. Utilities Com'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

Public interest

The phrase "affected with a public interest" means only that the industry for adequate reason is subject to legislative control for the public good.

U.S.—Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Monopolies

Authority of a state to regulate monopolies springs from police power and should be exercised only when necessary for general welfare and to end that all types of unjust, arbitrary, and unreasonable discrimination against interest of public may be eliminated.

Fla.—City of St. Petersburg v. Carter, 39 So. 2d 804 (Fla. 1949).

24 N.J.—Lane Distributors v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951).

25 Cal.—State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953).

Fla.—West Coast Hospital Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953).

Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

Incidental and accessory features

Where it becomes established that a business is subject to legislative regulation because affected with a public interest and devoted to a public use, incidental and accessory features, reasonable in scope and fair in aim, fall under same rule.

Mass.—Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269, 131 A.L.R. 1254 (1940).

26 Iowa—Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).

Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

Objectionable business in residential area

Cal.—Ex parte Hadacheck, 165 Cal. 416, 132 P. 584 (1913), aff'd, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).

27 Cal.—20th Century Ins. Co. v. Superior Court, 90 Cal. App. 4th 1247, 109 Cal. Rptr. 2d 611 (2d Dist. 2001).

28 N.J.—State v. New Jersey Trade Waste Ass'n, 191 N.J. Super. 144, 465 A.2d 596 (Law Div. 1983).

29 U.S.—Block v. Hirsh, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A.L.R. 165 (1921).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Police Power
A.L.R. Index, States
West's A.L.R. Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
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16A C.J.S. Constitutional Law § 711

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Constitutional Law

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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1. In General

§ 711. Limitations on police power, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The limit of a state's exercise of the police power is reached when the regulation transcends public necessity, or it is not reasonably related to safeguarding the public's health, safety, or welfare.

The police power is the least limitable of governmental powers; it is not a totally unlimited power.[1] Although it is not subject to any definite limitations but is coextensive with the necessities of the case and the safeguard of public interest,[2] the police power has its limitations.[3] Thus, the legislature cannot, under the guise of the police power of the State, enact a measure which deprives one of a right bound to be protected by the State.[4] The limit of a state's exercise of the power is reached when the regulation transcends public necessity,[5] or it is not reasonably related to safeguarding the public' health, safety, or welfare.[6] A state legislature under the guise of regulating in the public interest may not impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory.[7]

The police power should not be exercised to thwart lawful agreements not operating against public welfare,[8] or to suppress competition,[9] and no exercise of the police power can override the demands of natural justice.[10] However, the legitimate use of the power is not prohibited because of the possibility that the power may be abused.[11]

CUMULATIVE SUPPLEMENT

Cases:

Constitutional rights pertaining to private property are subordinate to the police power. McIlvaine v. City of St. Charles, 2015 IL App (2d) 141183, 396 Ill. Dec. 913, 40 N.E.3d 798 (App. Ct. 2d Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Kan.—State ex rel. Six v. Mike W. Graham & Associates, LLC, 42 Kan. App. 2d 1030, 220 P.3d 1105 (2009).

2 Ga.—State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000).

3 U.S.—Buchanan v. Warley, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917).
Kan.—State v. Wilson, 267 Kan. 550, 987 P.2d 1060 (1999).
N.C.—PNE AOA Media, L.L.C. v. Jackson County, 146 N.C. App. 470, 554 S.E.2d 657 (2001).
Wash.—Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).
Police power not circumscribed within narrow limits
The State's police power cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past because as society becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop, and expand, in the public interest, to meet such conditions.
W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).

4 Colo.—Trinen v. City and County of Denver, 53 P.3d 754 (Colo. App. 2002).
Ill.—People v. Williams, 394 Ill. App. 3d 286, 333 Ill. Dec. 744, 915 N.E.2d 815 (1st Dist. 2009).
Ohio—State v. Black, 2002-Ohio-731, 2002 WL 252393 (Ohio Ct. App. 6th Dist. Huron County 2002).
Pa.—Diwara v. State Board of Cosmetology, 852 A.2d 1279 (Pa. Commw. Ct. 2004).
Activity harmless or lawful
However laudable its purpose, exercise of police power may not extend to total prohibition of activity not otherwise unlawful.
Cal.—People ex rel. Younger v. County of El Dorado, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1979).

5 Fla.—William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364 (Fla. 1st DCA 1971).
Ky.—Johnson v. City of Paducah, 512 S.W.2d 514 (Ky. 1974).
Okla.—State v. Oklahoma Gas & Elec. Co., 1975 OK 40, 536 P.2d 887 (Okla. 1975).
Unnecessary and unreasonable restrictions
Legislature may not under guise of police power impose unnecessary and unreasonable restrictions on use of private property or pursuit of useful activities.
Haw.—State v. Cotton, 55 Haw. 148, 516 P.2d 715 (1973).

6 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

7 Kan.—State ex rel. Six v. Mike W. Graham & Associates, LLC, 42 Kan. App. 2d 1030, 220 P.3d 1105 (2009).

8 Or.—Ludgate v. Somerville, 121 Or. 643, 256 P. 1043, 54 A.L.R. 837 (1927).
Lawful agreements or restrictions
Police power may not be utilized to nullify lawful agreements or restrictions unless such agreements or restrictions operate to detriment of public welfare.

Minn.—Burger v. City of St. Paul, 241 Minn. 285, 64 N.W.2d 73 (1954).

9 U.S.—H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949).

Neb.—U.S. Brewers' Ass'n, Inc. v. State, 192 Neb. 328, 220 N.W.2d 544 (1974).

Pa.—Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).

10 Ga.—Mayor, etc., of Savannah v. Savannah Distributing Co., 202 Ga. 559, 43 S.E.2d 704 (1947).

Ill.—People v. Chicago, M. & St. P. Ry. Co., 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610 (1923).

11 Ill.—People ex rel. Gutknecht v. City of Chicago, 3 Ill. 2d 539, 121 N.E.2d 791 (1954).

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1. In General

§ 712. Personal rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

Personal rights must not be totally annihilated by the exercise of the police power or interfered with to a greater extent than reasonably necessary, taking into consideration the real object to be accomplished.

Personal rights, although subject to the police power, are not to be totally annihilated by the police power[1] or interfered with to a greater extent than reasonably necessary, taking into consideration the real object to be accomplished.[2] The police power must at all times be exercised with scrupulous regard for private rights constitutionally guaranteed,[3] and even then only in the public interest, and not for the benefit of a private company or individual.[4]

To preserve the public health, safety, and morals, the legislature may limit the enjoyment of personal liberty and property; however, the police power is not unrestricted and its exercise, like that of all other governmental powers, is subject to constitutional limitations and judicial review.[5] Thus, the police power may not be resorted to as a cloak for the invasion of personal rights guaranteed by a state constitution[6] and may not be exercised capriciously or unreasonably.[7] In order to be upheld

as constitutional, a law which places some restriction upon freedom of action in the name of the police power must bear some reasonable relation to the public good.[8]

Where one piece of property is subject to the police power of two municipalities, the constitutional right as the owner of that property to use and enjoy it however one sees fit must prevail with respect to a competition between the municipalities over their application of their police powers to the property.[9]

Footnotes

1 Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

2 Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

3 Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

4 Okla.—Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 205 Okla. 255, 236 P.2d 970 (1951).

5 Pa.—Com. v. McKown, 2013 PA Super 282, 79 A.3d 678 (2013).

6 Ga.—Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974).
Ill.—People v. City of Chicago, 413 Ill. 83, 108 N.E.2d 16 (1952).
Mo.—Graff v. Priest, 356 Mo. 401, 201 S.W.2d 945 (1947).

7 U.S.—Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978).
Haw.—State v. Shigematsu, 52 Haw. 604, 483 P.2d 997 (1971).
Neb.—Eckstein v. City of Lincoln, 202 Neb. 741, 277 N.W.2d 91 (1979).

8 N.Y.—Sweeney v. Murphy, 39 A.D.2d 306, 334 N.Y.S.2d 239 (4th Dep't 1972), order aff'd, 31 N.Y.2d 1042, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973).

9 La.—Cleco Power, LLC v. Beauregard Elec. Co-op., Inc., 984 So. 2d 925 (La. Ct. App. 3d Cir. 2008), writ denied, 992 So. 2d 1014 (La. 2008).

16A C.J.S. Constitutional Law § 713

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1. In General

§ 713. Requirement that statute be police law; lack of discrimination or unreasonableness; public purpose

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

A statute enacted as an exercise of the police power must, in fact, be a police law, that is, it must have as its object the prevention of some offense or manifest evil or the preservation of the public health, safety, or welfare.

In order that a statute may be sustained as an exercise of the police power, the law must, in fact, be a police law,[1] and the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare,[2] that there is some real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof,[3] and that the latter do in some appropriate manner tend toward the accomplishment of the object for which the power is exercised.[4]

The police power of the State cannot be used to oppress,[5] unduly oppress,[6] or favor;[7] rather, it must be used without discrimination or unreasonableness.[8]

The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power,[9] unless the public welfare authorizes the enactment,[10] and regulatory laws must not be the result of caprice[11] or of personal enmity.[12]

The legislature cannot use the police power as a subterfuge to do something that it otherwise could not do in the infringement of private interests or the restraint of private rights.[13] Nevertheless, the fact that an exercise of police power impinges upon private interest does not restrict reasonable regulation.[14]

The police power must be exercised for public purposes only.[15] The legislature may not exercise the police power for private purposes,[16] or for the exclusive benefit of particular individuals or classes,[17] although a statute which is otherwise within the police power or serves a public purpose is not unconstitutional merely because it incidentally benefits a limited number of persons.[18]

A statutory provision which is not a legitimate police regulation cannot be made so by being placed in the same act with a police regulation or by being enacted with a legislative declaration of a purpose which would be a proper object for the exercise of that power.[19] Even when legislative statements indicate an action was taken pursuant to the police power, this mere assertion does not make it so,[20] and it does not preclude a court from scrutinizing the act.[21] The public purpose necessary to support an exercise of police power is not imparted into a legislative act merely because it supersedes an act which had such public purpose.[22]

Footnotes

1 Ariz.—Edwards v. State Bd. of Barber Examiners, 72 Ariz. 108, 231 P.2d 450 (1951).
N.Y.—Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S.2d 798 (Sup 1941).

2 U.S.—Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).
Conn.—Kagan v. Alander, 44 Conn. Supp. 223, 680 A.2d 1015 (Super. Ct. 1994), aff'd, 42 Conn. App. 92, 677 A.2d 1391 (1996).
La.—City of Baton Rouge v. State, ex rel. Dept. of Social Services, 970 So. 2d 985 (La. Ct. App. 1st Cir. 2007).
N.M.—Regents of University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236, 129 Ed. Law Rep. 468 (1998).
Absolute necessity not required
Public necessity required to support exercise of police power need not be absolute, but requirement is satisfied if exercise of power is demanded by general welfare or is invoked to promote the common good.
Del.—State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951).

3 Minn.—Pomrenke v. Commissioner of Commerce, 677 N.W.2d 85 (Minn. Ct. App. 2004).
Wis.—Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).

4 U.S.—Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).
Ariz.—Wallace v. Shields, 175 Ariz. 166, 854 P.2d 1152 (Ct. App. Div. 1 1992).
Ill.—Meeker v. Tulis, 134 Ill. App. 3d 1093, 90 Ill. Dec. 10, 481 N.E.2d 810 (5th Dist. 1985).
Tenn.—State v. Booher, 978 S.W.2d 953 (Tenn. Crim. App. 1997).

5 Kan.—City of Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979).
N.Y.—Subway-Surface Sup'rs Ass'n v. New York City Transit Authority, 44 N.Y.2d 101, 404 N.Y.S.2d 323, 375 N.E.2d 384 (1978).
Pa.—Hardee's Food Systems, Inc. v. Department of Transp. of Pennsylvania, 495 Pa. 514, 434 A.2d 1209 (1981).

6 U.S.—Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F.3d 585, 2003 FED App. 0363P (6th Cir. 2003).
Ill.—In re Torski C., 395 Ill. App. 3d 1010, 335 Ill. Dec. 405, 918 N.E.2d 1218 (4th Dist. 2009).
Economic impact of legislation
In determining whether a governmental action is unduly oppressive, so as to exceed police power, a court must consider the economic impact of the regulation on the property holder and whether the governmental interference with property could be characterized as a physical intrusion.
Pa.—Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).
7 Md.—Mayor and City Council of Baltimore v. Byrd, 191 Md. 632, 62 A.2d 588 (1948).
8 Neb.—Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996).
Ohio—State v. Thompkins, 75 Ohio St. 3d 558, 1996-Ohio-264, 664 N.E.2d 926 (1996).
Tenn.—Rivergate Wine & Liquors, Inc. v. City of Goodlettsville, 647 S.W.2d 631 (Tenn. 1983).
9 U.S.—Coppage v. State of Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915) (overruled in part on other grounds by, Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941)).
Me.—State v. Union Oil Co. of Me., 151 Me. 438, 120 A.2d 708 (1956).
Pa.—Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951).
10 Me.—State v. Union Oil Co. of Me., 151 Me. 438, 120 A.2d 708 (1956).
Pa.—Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).
Conjecture insufficient
Claim that statutory restriction is in public interest cannot rest on mere conjecture but must be supported by something of substance.
N.M.—Drink, Inc. v. Babcock, 1966-NMSC-236, 77 N.M. 277, 421 P.2d 798 (1966).
Imposition of burden on individual
Police power cannot be exercised to impose a burden on the individual unless it results in benefit to the public.
Tex.—Lone Star Gas Co. v. Kelly, 140 Tex. 15, 165 S.W.2d 446 (Comm'n App. 1942).
11 Cal.—Ex parte Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (2d Dist. 1943).
N.Y.—S. E. Nichols Herkimer Corp. v. Village of Herkimer, 34 A.D.2d 371, 312 N.Y.S.2d 22 (4th Dep't 1970).
Capricious interference with private interest
Minn.—State v. Eakins, 720 N.W.2d 597 (Minn. Ct. App. 2006).
12 Cal.—Ex parte Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (2d Dist. 1943).
13 U.S.—Midwest Beverage Co. v. Gates, 61 F. Supp. 688 (N.D. Ind. 1945).
N.Y.—Bon-Air Estates, Inc. v. Building Inspector of Town of Ramapo, 31 A.D.2d 502, 298 N.Y.S.2d 763 (2d Dep't 1969).
14 Ky.—Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government, 131 S.W.3d 745 (Ky. 2004).
15 Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 265 Kan. 779, 962 P.2d 543 (1998).
Ky.—Pitcock v. Com., 295 S.W.3d 130 (Ky. Ct. App. 2009).
Minn.—State v. Eakins, 720 N.W.2d 597 (Minn. Ct. App. 2006).
Mo.—President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Com'n, 13 S.W.3d 635 (Mo. 2000).
16 U.S.—Porter v. DiBlasio, 93 F.3d 301 (7th Cir. 1996).
Va.—Fredericksburg Auto Auction, Inc. v. Department of Motor Vehicles, 242 Va. 42, 406 S.E.2d 23 (1991).
W. Va.—Security Nat. Bank & Trust Co. v. First W. Va. Bancorp., Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981).
Distribution of fund
State's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to special limited class of private individuals.
Fla.—State v. Lee, 356 So. 2d 276 (Fla. 1978).
17 Iowa—Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995).

Pa.—Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).

Economic protection

N.C.—North Carolina State Bd. of Registration for Professional Engineers and Land Surveyors v. International Business Machines Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Protection of one class against another

Okla.—Public Service Co. of Okl. v. Caddo Elec. Co-op., 1970 OK 219, 479 P.2d 572 (Okla. 1970).

Special class

To be supported by concept of general welfare legislation must aim to promote welfare of a properly classified segment of general public as contrasted with that of a small percentage or a special class of that body politic where no such classification can be justified.

Cal.—State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953).

18 Fla.—United Gas Pipe Line Co. v. Bevis, 336 So. 2d 560 (Fla. 1976).

Pa.—Basehore v. Hampden Indus. Development Authority, 433 Pa. 40, 248 A.2d 212 (1968).

R.I.—In re Advisory Opinion to Governor, 113 R.I. 586, 324 A.2d 641 (1974).

Objective controls

Crucial factor in determining whether purpose of statute constitutes a public purpose as required by constitution is ultimate objective of statute and fact that incidental benefits accrue to private interests is immaterial.

Haw.—State ex rel. Amemiya v. Anderson, 56 Haw. 566, 545 P.2d 1175 (1976).

19 U.S.—Coppage v. State of Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915) (overruled in part on other grounds by, Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941)).

Ark.—Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955).

Cal.—People v. Asamoto, 131 Cal. App. 2d 22, 279 P.2d 1010 (2d Dist. 1955).

Greater benefit

A law may serve public interest although it benefits certain individuals or classes more than others.

Iowa—John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89 (Iowa 1977).

Legislative declaration entitled to great weight

In determining whether a statute is reasonable, courts give due consideration to a declaration in statute that it is in interests of public health, safety, and general welfare, and such declaration is entitled to great weight, though not conclusive.

Or.—Christian v. La Forge, 194 Or. 450, 242 P.2d 797 (1952).

20 La.—New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002).

21 N.Y.—Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S.2d 798 (Sup 1941).

22 Neb.—Hubbell Bank v. Bryan, 124 Neb. 51, 245 N.W. 20 (1932).

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16A C.J.S. Constitutional Law § 714

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

D. Limitations on Police Power

1. In General

§ 714. Emergency legislation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

Legislation may be enacted under the police power, in times of emergency, which would not be appropriate at other times.

Statutes intended to provide relief in an emergency depend for their validity on a proper exercise of the police power.[1] Legislation may be enacted under the police power, in times of emergency, which would not be appropriate at other times.[2] In fact, there are circumstances in which a public emergency presents an exigent circumstance before which all private rights must immediately give way under the government's police power.[3] Such legislation is not invalid merely because it necessarily works a hardship on some individuals for a period of limited duration;[4] individual hardship is to be weighed by the courts against public advantages.[5] Nevertheless, emergency does not justify destruction.[6]

Although economic concerns can give rise to a state's use of the police power, such concerns must be related to unprecedented emergencies such as mass foreclosures caused by the Great Depression.[7]

Emergency legislation ordinarily contains a declaration that an emergency exists which is causing widespread distress to a large portion of the population with resulting danger to health, safety, or morals of the public generally,[8] but the mere legislative declaration does not of itself create an emergency which will warrant the legislation.[9] The actual existence of the emergency and not the limitation of the law's operation to a prescribed period gives validity to an exercise of the police power, and, when the emergency ceases to exist, the operation of the statute will be arrested even though the prescribed term of its operation may not then have expired.[10]

An emergency is an unusual public exigency calling for the exercise of the police power to alleviate the common peril or need,[11] and the emergency must be temporary, or it cannot be said to be an emergency.[12] The inquiry in all such cases is whether in right reason the public urgency sustains the remedy invoked.[13]

Police powers are rooted in the law of necessity, and thus, in an emergency, the scope of permissible regulation may increase.[14] According to other authority, an emergency does not create or enlarge the remedial power[15] or diminish restrictions of the constitution;[16] but it may furnish the occasion for its exercise in the essential common interest.[17] Emergency legislation must be addressed to a legitimate end,[18] and the measures taken must be reasonable and appropriate thereto.[19] A statute not enacted to have effect only during a period of public emergency cannot be sustained as emergency legislation.[20]

Footnotes

1 N.J.—Matter of Health Care Administration Bd., 83 N.J. 67, 415 A.2d 1147 (1980).
R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).

2 U.S.—American-Hawaiian S.S. Co. v. U.S., 85 F. Supp. 815 (S.D. N.Y. 1949), decree aff'd by, 191 F.2d 26 (2d Cir. 1951).
Ohio—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, 33 Ohio Op. 212, 67 N.E.2d 338 (C.P. 1946), judgment aff'd, 47 Ohio L. Abs. 280, 68 N.E.2d 108 (Ct. App. 2d Dist. Franklin County 1946).
R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).
Impairment of rights of property and person
N.Y.—Stahl v. Finkelstein, 189 Misc. 870, 73 N.Y.S.2d 679 (Mun. Ct. 1947).
Impairment of power to enforce contracts
U.S.—Ropico, Inc. v. City of New York, 425 F. Supp. 970 (S.D. N.Y. 1976).

3 Fla.—Davis v. City of South Bay, 433 So. 2d 1364 (Fla. 4th DCA 1983).

4 N.Y.—Stahl v. Finkelstein, 189 Misc. 870, 73 N.Y.S.2d 679 (Mun. Ct. 1947).

5 Tex.—Smith v. Smith, 126 S.W.3d 660 (Tex. App. Houston 14th Dist. 2004).

6 N.Y.—Darweger v. Staats, 153 Misc. 522, 275 N.Y.S. 394 (Sup 1934), aff'd, 243 A.D. 380, 278 N.Y.S. 87 (3d Dep't 1935), aff'd, 267 N.Y. 290, 196 N.E. 61 (1935).
Ohio—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, 33 Ohio Op. 212, 67 N.E.2d 338 (C.P. 1946), judgment aff'd, 47 Ohio L. Abs. 280, 68 N.E.2d 108 (Ct. App. 2d Dist. Franklin County 1946).

7 U.S.—New York State Correctional Officers & Police Benev. Ass'n, Inc. v. New York, 911 F. Supp. 2d 111 (N.D. N.Y. 2012).

8 R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).

9 R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).

10 Cal.—Ex parte Blaney, 30 Cal. 2d 643, 184 P.2d 892 (1947).
N.J.—Safeway Stores v. Botti, 137 N.J.L. 437, 60 A.2d 318 (N.J. Sup. Ct. 1948).
N.Y.—Patterson v. Daquet, 62 Misc. 2d 106, 308 N.Y.S.2d 173 (N.Y. City Civ. Ct. 1969).

11 Miss.—Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).

N.J.—Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954).

12 Iowa—First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939).

13 N.J.—Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954).

14 Cal.—Adkins v. State of California, 50 Cal. App. 4th 1802, 59 Cal. Rptr. 2d 59 (2d Dist. 1996) (abrogated on other grounds by, City of Moorpark v. Superior Court, 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 (1998)).

15 N.J.—Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954).

Pa.—Beaver County Building & Loan Ass'n v. Winowich, 323 Pa. 483, 187 A. 921 (1936).

16 N.J.—Sbrolla v. Hess, 23 N.J. Misc. 229, 43 A.2d 498 (Cir. Ct. 1945), judgment aff'd, 24 N.J. Misc. 261, 44 A.2d 36 (Sup. Ct. 1945).

N.Y.—Flushing Nat. Bank v. Municipal Assistance Corp. for City of New York, 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848 (1976).

Pa.—Beaver County Building & Loan Ass'n v. Winowich, 323 Pa. 483, 187 A. 921 (1936).

17 N.J.—Matter of Health Care Administration Bd., 83 N.J. 67, 415 A.2d 1147 (1980).

18 Me.—Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 8 A.2d 898 (1939).

19 Me.—Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 8 A.2d 898 (1939).

20 Me.—Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 8 A.2d 898 (1939).

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16A C.J.S. Constitutional Law § 715

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

D. Limitations on Police Power

1. In General

§ 715. Subordination to constitution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

The police power of the State may be exercised to enact laws within constitutional limitations; and thus, the exercise of the police power will be under the control of the principles of constitutional law.

The police power of the State may be exercised to enact laws within constitutional limitations.[1] Thus, the exercise of the police power is under the control of the principles of constitutional law;[2] it must be exercised with scrupulous regard for constitutionally guaranteed rights.[3] The constitutional guaranties stand in equal strength and force with the police power and are not subordinate to it.[4] Thus, when an assertion of constitutional rights is in opposition to the police power of a state, a court must balance the interests involved.[5] A constitutionally reasonable regulation is one that is reasonably necessary to protect the public safety or welfare and is substantially related to the legitimate ends sought; courts balance the public benefit from the regulation against the degree to which it frustrates the purpose of a constitutional provision.[6] If a court determines that a statute is reasonably designed to remedy evils which the legislature determined to be a threat to public health, safety, and the general welfare, it will be deemed a proper exercise of the police power and will withstand constitutional challenge.[7]

The police power cannot be used indiscriminately as a prop to thrust the constitution aside,[8] and the circumstances that call for such exercise must definitely and clearly appear, and the exercise must be in furtherance of a clearly defined major object of government.[9] Only on rare occasions, under circumstances of extraordinary nature, have courts sustained the exercise of the power where it transcended positive constitutional provisions which stood in its way,[10] and such an extraordinary exercise of the power cannot be justified where the means were at hand to formulate legislation entirely within the constitution.[11] Thus, the broad mantle of public health does not shield public health measures from all constitutional scrutiny; police power may not be used to violate positive constitutional mandate.[12]

Limited by state constitution.

The police power remains subject to the limitations imposed by the state constitution upon every power of government.[13] State constitutional rights restrict the police power[14] but not obliterate it.[15] However broad the scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution,[16] and the legislature, through its exercise of the police power, may not render the constitution meaningless,[17] nor may constitutional guaranties and limitations be set aside by an application of such power, because of changed economic, sociological, or political conditions.[18]

The conflict between the constitution and the exercise of the police power must be clear,[19] and a reasonable exercise of the police power is not prohibited by provisions for the general protection of individual life, liberty, and property.[20] In fact, under its police power, the legislature may limit constitutional rights of personal liberty and property.[21] A constitutional prohibition against the abridgment of the police power relates to all phases of its exercise and is superior to constitutional provisions in opposition thereto,[22] but attempts to produce wrongful results through its exercise may be frustrated when they run counter to adverse constitutional limitations.[23]

Bill of rights.

The police power of a state is subject to the "bill of rights" of both the federal and state constitutions and must not violate its inhibitions.[24] Thus, the State's police power is limited by the United States Constitution's First Amendment right to free speech.[25] In fact, there is an inherent tension between the exercise of First Amendment rights and the government's desire to protect and preserve life and property[26] or to preserve public peace and security,[27] tranquility, quiet enjoyment, and the well-being of the community.[28]

Footnotes

1 Fla.—Enoch v. State, 95 So. 3d 344 (Fla. 1st DCA 2012), review denied, 108 So. 3d 654 (Fla. 2013).
Kan.—State ex rel. Six v. Mike W. Graham & Associates, LLC, 42 Kan. App. 2d 1030, 220 P.3d 1105 (2009).
N.C.—King v. Town of Chapel Hill, 367 N.C. 400, 758 S.E.2d 364 (2014).
Pa.—Com. v. McKown, 2013 PA Super 282, 79 A.3d 678 (2013).
W. Va.—Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).

2 Ill.—American Shuffleboard & Music Corp. v. City of Springfield, 40 Ill. App. 3d 745, 353 N.E.2d 1 (4th Dist. 1976).
Kan.—City of Baxter Springs v. Bryant, 226 Kan. 383, 598 P.2d 1051 (1979).

N.Y.—People v. Holbrook Transp. Corp., 84 Misc. 2d 650, 378 N.Y.S.2d 939 (Dist. Ct. 1976).

Separation of powers doctrine

Md.—Attorney General of Maryland v. Waldron, 289 Md. 683, 426 A.2d 929, 17 A.L.R.4th 794 (1981).

3 N.H.—L. Grossman & Sons, Inc. v. Town of Gilford, 118 N.H. 480, 387 A.2d 1178 (1978).

N.Y.—Flushing Nat. Bank v. Municipal Assistance Corp. for City of New York, 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848 (1976).

Okla.—Central Liquor Co. v. Oklahoma Alcoholic Beverage Control Bd., 1982 OK 16, 640 P.2d 1351 (Okla. 1982).

4 N.H.—State v. Paille, 90 N.H. 347, 9 A.2d 663 (1939).

5 Mo.—State v. Joos, 120 S.W.3d 778 (Mo. Ct. App. S.D. 2003).

Balancing landowner's rights against public interest protected by exercise of police power

Pa.—Township of Exeter v. Zoning Hearing Bd. of Exeter Tp., 599 Pa. 568, 962 A.2d 653 (2009).

Balancing substantive due process rights against police power

La.—State v. Golston, 67 So. 3d 452 (La. 2011).

Balancing of police power and contract rights under constitution

A court's core task in resolving Contract Clause claims is to strike a balance between constitutionally protected contract rights and the State's legitimate exercise of its reserved police power.

N.H.—State Employees' Ass'n of New Hampshire v. State, 161 N.H. 730, 20 A.3d 961 (2011).

6 Wash.—State v. Jorgenson, 179 Wash. 2d 145, 312 P.3d 960 (2013).

7 Ill.—People v. Heineman, 260 Ill. App. 3d 476, 198 Ill. Dec. 211, 632 N.E.2d 270 (1st Dist. 1994).

8 Pa.—Com. ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932).

9 Pa.—Com. ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932).

Test of basis

Exercise of police power must be on reasonable basis and one test is that attempted regulation must tend to such ulterior public good that even though it does infringe upon constitutional rights, infringement is necessary in promotion of health, safety, and welfare of community.

Tenn.—Winters v. Sawyer, 225 Tenn. 113, 463 S.W.2d 705 (1971).

10 Pa.—Com. ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932).

11 Pa.—Com. ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932).

12 Ill.—People v. Adams, 149 Ill. 2d 331, 173 Ill. Dec. 600, 597 N.E.2d 574 (1992).

13 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

14 Wis.—State v. Hamdan, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (2003).

15 N.H.—Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association, 159 N.H. 627, 992 A.2d 624 (2010).

16 N.Y.—Bellanca v. New York State Liquor Authority, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981).

Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

Utah—Dean v. Rampton, 556 P.2d 205 (Utah 1976).

Character of evil

Constitutional limitations on use of police power are dependent on character of evil and degree of danger sought to be avoided.

Ky.—Mansbach Scrap Iron Co. v. City of Ashland, 235 Ky. 265, 30 S.W.2d 968 (1930).

Public purpose

Constitutional provision that public health and general welfare of people of state are matters of primary public concern and that legislature shall pass suitable laws for protection and promotion of public health, together with traditional public policy of state, limit powers of legislature and of government generally to such legislative acts and such governmental powers as exhibit a public purpose.

Mich.—City of Gaylord v. Beckett, 378 Mich. 273, 144 N.W.2d 460 (1966).

17 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

18 Md.—Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455 (1925).

Demands of society not substitute for orderly amendment

Ky.—McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977).

19 Ala.—Associated Industries of Alabama, Inc. v. Britton, 371 So. 2d 904 (Ala. 1979).

Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).

Va.—West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881 (1937).

20 Ill.—Henson v. City of Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953).

Mo.—Flower Valley Shopping Center, Inc. v. St. Louis County, 528 S.W.2d 749 (Mo. 1975).

Pa.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 168 Pa. Super. 360, 78 A.2d 46 (1951).

Protecting vital interests of the state's people

N.H.—Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association, 159 N.H. 627, 992 A.2d 624 (2010).

21 Pa.—Nixon v. Com., 576 Pa. 385, 839 A.2d 277 (2003).

22 Pa.—Com. v. Widovich, 295 Pa. 311, 145 A. 295 (1929).

23 Pa.—Jackman v. Rosenbaum Co., 263 Pa. 158, 106 A. 238 (1919), aff'd, 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107 (1922).

24 U.S.—American Federation of Labor v. Swing, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941).

Ill.—Berz v. City of Evanston, 2013 IL App (1st) 123763, 375 Ill. Dec. 422, 997 N.E.2d 733 (App. Ct. 1st Dist. 2013), appeal denied, 378 Ill. Dec. 229, 3 N.E.3d 794 (Ill. 2014).

Mo—Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n, 344 S.W.3d 160 (Mo. 2011).

Wash.—State v. Sieyes, 168 Wash. 2d 276, 225 P.3d 995 (2010).

Effect of Amendments to the Federal Constitution on exercise of the police power by the states, generally, see § 716.

25 Tex.—Frieling v. State, 67 S.W.3d 462 (Tex. App. Austin 2002), petition for discretionary review refused, (June 19, 2002).

26 Cal.—In re Juan C., 28 Cal. App. 4th 1093, 33 Cal. Rptr. 2d 919 (2d Dist. 1994).

27 U.S.—New Alliance Party v. Dinkins, 743 F. Supp. 1055 (S.D. N.Y. 1990).

28 Tex.—Blanco v. State, 761 S.W.2d 38 (Tex. App. Houston 14th Dist. 1988).

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16A C.J.S. Constitutional Law § 716

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

D. Limitations on Police Power

1. In General

§ 716. Law in contravention of constitution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

A state statute enacted in pursuance of the police power is void if in contravention of any express provision of the Federal Constitution.

The Constitution of the United States does not contain any express limitation on the police power of the states as such,[1] or that a legislative enactment must be within the police power of government,[2] and does not limit a state's power to make all regulations within the limitation of reasonable necessity to advance or secure the general welfare.[3] It does, however, forbid the exercise of certain powers by the states.[4] It expressly declares that the Federal Constitution itself and federal laws and treaties made in pursuance thereof are the supreme law of the land,[5] and therefore, the police power of the states is subject to specific limitations imposed by the Constitution of the United States.[6]

A state statute enacted in pursuance of the police power is void if in contravention of any express provision of the Federal Constitution.[7] Consequently, the courts will invalidate legislative enactments if they exceed the limitations placed on the

legislature's exercise of the police power by the Federal Constitution.[8] An amendment of a state constitution, which diminishes rather than increases the police powers of the legislature, is not contrary to any of the provisions of the Federal Constitution.[9]

Whenever there is a conflict between the police power and the United States Constitution, the courts will construe the Federal Constitution to fit in with the police regulations if at all reasonable.[10] The rule that an important, substantial,[11] or compelling state interest must be shown to justify an application of the police power which infringes a constitutionally protected right[12] does not apply to a law which encourages alternative action to the exercise of the constitutionally protected right.[13]

Amendments to Federal Constitution.

Amendments to the Federal Constitution were not intended to interfere with the reasonable exercise of the police power by the states.[14] Thus, the Fourteenth Amendment to the Constitution of the United States will not prevent enactment of laws for the protection of public health, safety, welfare, or morals, nor do they prohibit legislative classifications reasonably calculated to promote or serve such public interests.[15] The Amendment does not deprive the states of, or interfere with, their police power, and subject to the limitations expressed therein, the states may continue to exercise their police powers as fully as before the adoption of the Amendment.[16] Nevertheless, this discretion is limited by the constitutional guarantee, pursuant to the Fourteenth Amendment, that a person may not be deprived of liberty without due process of law.[17]

Footnotes

1 Ga.—De Berry v. City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).
Tex.—Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 96 A.L.R. 802 (1934).

2 Md.—VNA Hospice of Maryland v. Department of Health and Mental Hygiene, 406 Md. 584, 961 A.2d 557 (2008).

3 Mo.—Flower Valley Shopping Center, Inc. v. St. Louis County, 528 S.W.2d 749 (Mo. 1975).
Neb.—Louis Finocchiaro, Inc. v. Nebraska Liquor Control Com'n, 217 Neb. 487, 351 N.W.2d 701 (1984).
N.Y.—People v. Kiger, 68 Misc. 2d 100, 326 N.Y.S.2d 591 (N.Y. City Crim. Ct. 1971).

4 U.S. Const. Art. I, § 10.

5 U.S. Const. Art. VI, § 2.

6 N.C.—Armstrong v. North Carolina State Bd. of Dental Examiners, 129 N.C. App. 153, 499 S.E.2d 462 (1998).

7 U.S.—Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).
Idaho—State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953).
N.H.—Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association, 159 N.H. 627, 992 A.2d 624 (2010).
Wash.—Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wash. 2d 418, 511 P.2d 1002 (1973).

8 Wash.—State v. Audley, 77 Wash. App. 897, 894 P.2d 1359 (Div. 1 1995).

9 Ohio—Hockett v. State Liquor Licensing Bd., 91 Ohio St. 176, 110 N.E. 485 (1915).

10 U.S.—Ziffrin, Inc. v. Martin, 24 F. Supp. 924 (E.D. Ky. 1938), aff'd, 308 U.S. 132, 60 S. Ct. 163, 84 L. Ed. 128 (1939) (abrogated on other grounds by, Granholm v. Heald, 544 U.S. 460, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)).
Cal.—In re Werden, 76 Cal. App. 3d 79, 142 Cal. Rptr. 622 (4th Dist. 1977).
Nature of deference
Federal deference in matters within state police power reflects more than a policy of comity; in fact, it represents a constitutionally derived recognition of essential character of state government within federal system.
U.S.—Ensminger v. C. I. R., 610 F.2d 189 (4th Cir. 1979).

11 Tex.—Martinez v. State, 744 S.W.2d 224 (Tex. App. Houston 14th Dist. 1987).

12 U.S.—Potter v. Murray City, 585 F. Supp. 1126 (D. Utah 1984), judgment aff'd as modified on other grounds, 760 F.2d 1065 (10th Cir. 1985).

Okla.—Matter of Adoption of Blevins, 1984 OK CIV APP 41, 695 P.2d 556 (Ct. App. Div. 1 1984).

13 U.S.—Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977).

When compelling

A state interest becomes compelling when its vindication is more crucial than the vindication of a fundamental right.

R.I.—Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F. Supp. 625 (D.R.I. 1984).

14 Ind.—Ule v. State, 208 Ind. 255, 194 N.E. 140, 101 A.L.R. 903 (1935).

N.Y.—Alexewicz v. General Aniline & Film Corp., 181 Misc. 181, 43 N.Y.S.2d 713 (Sup 1943).

Ohio—State v. Acme Scrap Iron and Metal, 49 Ohio App. 2d 371, 3 Ohio Op. 3d 444, 361 N.E.2d 250 (11th Dist. Ashtabula County 1974).

Police power of state subject to bill of rights of federal and state constitutions, generally, see § 715.

15 Ill.—Meeker v. Tulis, 134 Ill. App. 3d 1093, 90 Ill. Dec. 10, 481 N.E.2d 810 (5th Dist. 1985).

16 U.S.—PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

Ill.—Henson v. City of Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953).

S.D.—City of Rapid City v. Schmitt, 75 S.D. 636, 71 N.W.2d 297 (1955).

17 Ill.—People v. Grant, 339 Ill. App. 3d 792, 274 Ill. Dec. 304, 791 N.E.2d 100 (1st Dist. 2003).

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

D. Limitations on Police Power

2. Functions of Legislature and Judiciary

§ 717. Functions of legislature and judiciary, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

Courts have the duty to pass on the validity of police regulations and to enforce such as are enacted by the legislature in good faith and with reasonable regard for the protection which the State owes to its citizens, but all matters relating to the policy, wisdom, and expediency of such regulations are primarily for legislative, rather than judicial, determination.

Courts have the duty to enforce police regulations enacted by the legislature in good faith and with reasonable and appropriate regard for the protection which the State owes to the life, health, and property of its citizens.[1] The inherent power of the body politic to enact and enforce laws for the promotion of the general welfare is vested in the first instance in the legislature.[2] Consequently, all matters relating to the wisdom of particular regulations under the police power are exclusively or primarily for legislative, rather than judicial, determination.[3]

When reviewing the legislature's exercise of police power, the only duty of the courts is to ascertain whether the act violates any constitutional limitation, the question of public policy being solely one for the legislature.[4] In this connection, the legislature

is vested with a broad,[5] large,[6] considerable,[7] or wide discretion[8] or leeway[9] in exercising the police power.It is the duty and responsibility of the legislature to make such decisions.[10]

Courts may not substitute their judgment for that of a legislative body in matters relating to the exercise of the police power.[11] Such determinations by the legislature will not be interfered with, save in clear cases of abuse[12] and unless the regulation in question has no relation to the ends for which the police power exists[13] and is clearly erroneous.[14] Courts generally are indisposed to allow the police power to be impaired or defeated by constitutional limitations.[15] They must accord great deference to the legislature's exercise of the police powers unless to do so would clearly offend the limitations and prohibitions of the constitution.[16]

When a subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature,[17] which is entitled to form its own judgment without the courts substituting their own,[18] and its action within its range of discretion cannot be set aside because compliance is burdensome.[19] Nevertheless, legislation purporting to be enacted under the police power is subject to review by the courts.[20]

The court, in the exercise of its function, may decide what constitutes a proper exercise of the police power,[21] whether legislation purporting to be enacted in the exercise of the police power is really such,[22] and whether statutes or regulations prescribed by the legislature are reasonable[23] or whether such prescribed statutes or regulations are otherwise unconstitutional,[24] and judicial knowledge may be consulted and relied on.[25]

The courts, in passing on the validity of statutes purporting to have been enacted under the police power, must disregard all matters that relate to the wisdom or policy of the act[26] and may declare the act void when it clearly appears that it bears no real,[27] just,[28] or substantial[29] relation to the police power, or the means adopted for effecting the object are manifestly arbitrary and unreasonable.[30] They cannot review the economics or facts on which the legislature bases its conclusions that an existing evil should be remedied by an exercise of the police power.[31] Legislative action taken to meet an evil in the form in which it most clearly exists cannot be said to be either clearly unreasonable or palpably arbitrary.[32] To sustain an action under a state's police power, however, the courts must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare, or morals.[33]

It is the duty of the judiciary to pronounce the invalidity of a statute which plainly transcends the limits of the police power of the State,[34] but when the exercise of the power bears a reasonable relation to a legitimate purpose, the courts may not interfere.[35] The court will, however, regard the validity, necessity, and wisdom of a police regulation from the standpoint of existing conditions and present times[36] and may consider all those external or historical facts which led to its enactment.[37] In determining whether a governmental action is unduly oppressive, so as to exceed police power, court must consider the economic impact of the regulation on the property holder and whether the governmental interference with property could be characterized as a physical intrusion.[38]

Footnotes

1 N.J.—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 6 N.J. Super. 495, 69 A.2d 767 (Law Div. 1949).
Or.—Christian v. La Forge, 194 Or. 450, 242 P.2d 797 (1952).

2 Pa.—Meitner v. Cheltenham Tp., 75 Pa. Commw. 46, 460 A.2d 1235 (1983).

3 Ga.—Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, 281 Ga. 342, 638 S.E.2d 307 (2006).

Kan.—State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 265 Kan. 779, 962 P.2d 543 (1998).

Mo.—Damon v. City of Kansas City, 419 S.W.3d 162 (Mo. Ct. App. W.D. 2013), transfer denied, (Dec. 24, 2013) and transfer denied, (Feb. 25, 2014).

Restraint of injurious use of property

N.C.—Kirby v. North Carolina Dept. of Transp., 769 S.E.2d 218 (N.C. Ct. App. 2015).

4 N.C.—State v. Arnold, 147 N.C. App. 670, 557 S.E.2d 119 (2001), judgment aff'd, 356 N.C. 291, 569 S.E.2d 648 (2002).

5 Fla.—Raines v. State, 805 So. 2d 999 (Fla. 4th DCA 2001).

Ill.—Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 286 Ill. Dec. 566, 814 N.E.2d 216 (4th Dist. 2004), judgment aff'd, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005).

Ky.—Pitcock v. Com., 295 S.W.3d 130 (Ky. Ct. App. 2009).

N.M.—State v. Valdez, 2013-NMCA-016, 293 P.3d 909 (N.M. Ct. App. 2012).

6 Minn.—Dean v. City of Winona, 843 N.W.2d 249 (Minn. Ct. App. 2014), review granted, (May 20, 2014).

Miss.—Claypool v. Mladineo, 724 So. 2d 373 (Miss. 1998).

7 U.S.—Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987).

Iowa—Fox v. Interstate Power Co., 521 N.W.2d 762 (Iowa Ct. App. 1994).

8 Ill.—People v. Williams, 394 Ill. App. 3d 286, 333 Ill. Dec. 744, 915 N.E.2d 815 (1st Dist. 2009).

Ind.—Paul Stieler Enterprises, Inc. v. City of Evansville, 2 N.E.3d 1269 (Ind. 2014).

Ky.—State v. Wilson, 267 Kan. 550, 987 P.2d 1060 (1999).

Mo.—State v. Richard, 298 S.W.3d 529 (Mo. 2009).

9 U.S.—Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

10 Ga.—City of Lilburn v. Sanchez, 268 Ga. 520, 491 S.E.2d 353 (1997).

11 Mo.—Damon v. City of Kansas City, 419 S.W.3d 162 (Mo. Ct. App. W.D. 2013), transfer denied, (Dec. 24, 2013) and transfer denied, (Feb. 25, 2014).

N.J.—Ortley Beach Property Owners Ass'n v. Fire Com'rs of Dover Tp. Fire Dist. No. 1, 320 N.J. Super. 132, 726 A.2d 1004 (Law Div. 1998), opinion aff'd, 330 N.J. Super. 358, 749 A.2d 889 (App. Div. 2000).

Constraints on individual freedoms imposed by State

Wash.—State v. Clinkenbeard, 130 Wash. App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850 (Div. 3 2005).

12 N.M.—State v. Druktenis, 135 N.M. 223, 2004-NMCA-032, 86 P.3d 1050 (Ct. App. 2004).

13 U.S.—Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

Mo.—Harris v. Missouri Dept. of Conservation, 895 S.W.2d 66 (Mo. Ct. App. W.D. 1995).

14 Kan.—Lower v. Board of Directors of Haskell County Cemetery Dist., 274 Kan. 735, 56 P.3d 235 (2002).

15 Ala.—State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 186 So. 487, 121 A.L.R. 283 (1939).

La.—Attaya v. Town of Gonzales, 192 So. 2d 188 (La. Ct. App. 1st Cir. 1966).

16 Ky.—Posey v. Com., 185 S.W.3d 170 (Ky. 2006).

17 U.S.—Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932).

Colo.—Town of Dillon v. Yacht Club Condominiums Home Owners Association, 2014 CO 37, 325 P.3d 1032 (Colo. 2014).

Fla.—Florida Dept. of Agriculture and Consumer Services v. Haire, 836 So. 2d 1040 (Fla. 4th DCA 2003), decision approved, 870 So. 2d 774 (Fla. 2004).

Ga.—Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, 281 Ga. 342, 638 S.E.2d 307 (2006).

N.C.—Matter of Broad and Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

18 U.S.—U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).

Utah—Taghipour v. Jerez, 2001 UT App 139, 26 P.3d 885 (Utah Ct. App. 2001), judgment aff'd, 2002 UT 74, 52 P.3d 1252 (Utah 2002).

Wash.—State v. Balzer, 91 Wash. App. 44, 954 P.2d 931 (Div. 2 1998).

19 U.S.—U.S. v. Bethlehem Steel Corp., 315 U.S. 289, 62 S. Ct. 581, 86 L. Ed. 855 (1942).

Okla.—Red River Const. Co. v. City of Norman, 1981 OK 20, 624 P.2d 1064 (Okla. 1981).

20 U.S.—Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923).

Pa.—Nixon v. Com., 576 Pa. 385, 839 A.2d 277 (2003).
Wash.—Granat v. Keasler, 99 Wash. 2d 564, 663 P.2d 830 (1983).

21 U.S.—Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A.L.R. 661 (1924).
Ariz.—Allen v. Girard, 155 Ariz. 134, 745 P.2d 192 (Ct. App. Div. 2 1987).
Ill.—People v. Tolbert, 354 Ill. App. 3d 94, 289 Ill. Dec. 498, 820 N.E.2d 6 (1st Dist. 2004).
N.M.—Regents of University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236, 129 Ed. Law Rep. 468 (1998).

22 U.S.—Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (overruled in part on other grounds by, Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952)) and (overruled in part on other grounds by, Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963)).
Ky.—McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977).

General benefit

Threshold question in determining whether statute was valid exercise of police power was to decide whether it benefits public, generally.
Pa.—Com. v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

23 U.S.—Norfolk & W. Ry. Co. v. Public Service Commission of West Virginia, 265 U.S. 70, 44 S. Ct. 439, 68 L. Ed. 904 (1924); Johnson v. American Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008).
Tex.—Tenet Hospitals Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014).
Wash.—City of Seattle v. Montana, 129 Wash. 2d 583, 919 P.2d 1218 (1996).

24 Ill.—Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008).
Ky.—Posey v. Com., 185 S.W.3d 170 (Ky. 2006).
N.D.—State v. Ertelt, 548 N.W.2d 775 (N.D. 1996).

Substance, not form, regarded

In determining whether a statute enacted in the exercise of the police power contravenes constitutional guaranties, the courts are not bound by mere forms but must look at the substance.
N.D.—State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943).

25 Ky.—City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851 (1940).

26 Mo.—City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005).
Ohio—State v. Bontrager, 114 Ohio App. 3d 367, 683 N.E.2d 126 (3d Dist. Hardin County 1996).
Wis.—Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).

27 Cal.—Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 125 Cal. Rptr. 2d 561 (4th Dist. 2002).
Ohio—State v. Bontrager, 114 Ohio App. 3d 367, 683 N.E.2d 126 (3d Dist. Hardin County 1996).
Wis.—Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).

28 Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

29 Cal.—Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 125 Cal. Rptr. 2d 561 (4th Dist. 2002).
Wis.—Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).

30 U.S.—Jones v. City of Portland, 245 U.S. 217, 38 S. Ct. 112, 62 L. Ed. 252 (1917).
Cal.—Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 125 Cal. Rptr. 2d 561 (4th Dist. 2002).
Md.—Supermarkets General Corp. v. State, 286 Md. 611, 409 A.2d 250 (1979).

31 Mass.—Com. v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969).
Mo.—Meyer v. St. Louis County, 602 S.W.2d 728 (Mo. Ct. App. E.D. 1980).
N.J.—Reingold v. Harper, 6 N.J. 182, 78 A.2d 54 (1951).

32 Ill.—People ex rel. Gutknecht v. City of Chicago, 3 Ill. 2d 539, 121 N.E.2d 791 (1954).
Ohio—City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 2 Ohio Op. 3d 278, 357 N.E.2d 402 (8th Dist. Cuyahoga County 1976).

33 La.—City of Baton Rouge v. State, ex rel. Dept. of Social Services, 970 So. 2d 985 (La. Ct. App. 1st Cir. 2007).

34 Ala.—Crabtree v. City of Birmingham, 292 Ala. 684, 299 So. 2d 282 (1974).
Pa.—Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995).
Tex.—Texas State Bd. of Pharmacy v. Gibson's Discount Center, Inc., 541 S.W.2d 884 (Tex. Civ. App. Austin 1976), writ refused n.r.e., (Mar. 9, 1977).

35 U.S.—Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923).
Pa.—Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995).

36 U.S.—Local 2263, Intern. Ass'n of Fire Fighters AFL-CIO v. City of Tupelo, Miss., 439 F. Supp. 1224 (N.D. Miss. 1977).
N.Y.—People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (County Ct. 1968).
Pa.—Flynn v. Horst, 356 Pa. 20, 51 A.2d 54 (1947).

37 Va.—Stickley v. Givens, 176 Va. 548, 11 S.E.2d 631 (1940).

38 Pa.—Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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2. Functions of Legislature and Judiciary

§ 718. Test of validity of statute

Topic Summary | References | Correlation Table

West's Key Number Digest

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West's Key Number Digest, States 21(2)

Admitting that the subject to which a statute relates is within the scope of the legislative power, the test of validity within the police power is whether or not the ends sought to be attained are appropriate, and the regulation prescribed is reasonable.

Admitting that the subject to which a statute relates is within the scope of the legislative power, the test of validity within the police power is whether or not the ends sought to be attained are appropriate, and the regulation prescribed is reasonable.[1] The measure of reasonableness of a police regulation is what is fairly appropriate to its purpose under all circumstances and not necessarily what is best.[2] Legislation is sustained if it relates to the claimed objective and employs the means that are both reasonable and reasonably appropriate to secure the objective.[3] As otherwise stated, for a statute to be a proper exercise of police power, it must (1) be appropriate and reasonably necessary to accomplish a purpose within the scope of the police power and (2) be reasonable and not arbitrary or unjust in the manner it seeks to accomplish the goal of the statute or so unduly harsh that it is out of proportion to the end sought to be accomplished.[4]

The test of reasonableness is whether the attempted regulation makes efficient constitutional guaranties and conserves rights or is destructive of inherent rights.[5] If the regulations prescribed are reasonable, they are valid,[6] but if they are unreasonable, they are void.[7] The use of the police power will not be interfered with unless it is shown to be misused or abused or where it is shown to be exercised arbitrarily, oppressively, or unreasonably.[8] In applying this test, the presumption is in favor of the validity of the law[9] so that unconstitutionality must be clearly shown.[10] To justify interference by the courts, excessive and oppressive abuse of power must be shown.[11] Before a reviewing court can hold that an exercise of the State's police power is unconstitutional, it must find that the exercise has no substantial relationship to public health, safety, morals, or general welfare.[12]

Determination of reasonableness of an exercise of the police power requires balancing the effect on private interests and the public good to be achieved,[13] or a balancing between the regulating authority of the State and the rights of the individuals whose freedom as a result may be somewhat curtailed,[14] or balancing the public benefit from the regulation against the degree to which it frustrates the purpose of a constitutional provision.[15] If the public benefit outweighs the restraint imposed[16] or the interference with private rights,[17] reasonableness is indicated, but if the private injury outweighs the public advantage, the measure is unreasonable.[18]

Reasonableness requirement for restrictions on speech.

The reasonableness requirement for restrictions on speech in a nonpublic forum requires more of a showing than does the traditional rational basis test; that is, it is not the same as establishing that the regulation is rationally related to a legitimate governmental objective as might be the case for the typical exercise of the government's police power.[19]

Impairment of contracts.

The threshold inquiry in the analysis of whether a regulation violates the Contract Clause of the United States Constitution is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship; if the threshold inquiry is met, the court must inquire whether the State, in justification, has a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem, to guarantee that the State is exercising its police power, rather than providing a benefit to special interests, and whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.[20]

Footnotes

1 U.S.—U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
Ill.—People v. Rennie, 2014 IL App (3d) 130014, 381 Ill. Dec. 585, 10 N.E.3d 994 (App. Ct. 3d Dist. 2014).
Ind.—Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc., 988 N.E.2d 250 (Ind. 2013).
Tenn.—State v. Booher, 978 S.W.2d 953 (Tenn. Crim. App. 1997).
Zoning regulation
Mich.—Kyser v. Township, 486 Mich. 514, 786 N.W.2d 543 (2010).
N.Y.—Festa v. New York City Dept. of Consumer Affairs, 12 Misc. 3d 466, 820 N.Y.S.2d 452 (Sup 2006), aff'd as modified, 37 A.D.3d 343, 830 N.Y.S.2d 133 (1st Dep't 2007).

2 Ill.—Meeker v. Tulis, 134 Ill. App. 3d 1093, 90 Ill. Dec. 10, 481 N.E.2d 810 (5th Dist. 1985).
Me.—Opinion of the Justices, 437 A.2d 597 (Me. 1981).
Reasonableness dependent on facts
R.I.—In re Advisory Opinion to Governor, 113 R.I. 586, 324 A.2d 641 (1974).

Current economic conditions

The reasonableness of exercise of police power in enactment of a statute must be considered in light of current economic conditions.

Fla.—Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

3 Ind.—Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc., 988 N.E.2d 250 (Ind. 2013).

4 Tex.—Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

5 U.S.—Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

Ariz.—Wallace v. Shields, 175 Ariz. 166, 854 P.2d 1152 (Ct. App. Div. 1 1992).

Wash.—Spokane County v. Valu-Mart, Inc., 69 Wash. 2d 712, 419 P.2d 993 (1966).

Cost of complying with regulation as element

U.S.—Missouri Pac. R. Co. v. Norwood, 13 F. Supp. 24 (W.D. Ark. 1900), aff'd, 290 U.S. 600, 54 S. Ct. 227, 78 L. Ed. 527 (1933).

Effect of existing habits and customs

U.S.—First Nat. Ben. Soc. v. Garrison, 58 F. Supp. 972 (S.D. Cal. 1945), judgment aff'd, 155 F.2d 522 (C.C.A. 9th Cir. 1946).

6 Ill.—Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 286 Ill. Dec. 566, 814 N.E.2d 216 (4th Dist. 2004), judgment aff'd, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005).

La.—Bundrick v. Lafayette Parish Police Jury, 462 So. 2d 1319 (La. Ct. App. 3d Cir. 1985).

N.J.—Chase Manhattan Bank v. Josephson, 135 N.J. 209, 638 A.2d 1301 (1994).

Litigant's rights under open-courts provision of constitution

Balance prong of test to establish whether legislation violates a litigant's rights under the open-courts provision of the state constitution considers whether the legislature's action was arbitrary or unreasonable by deciding (1) whether a substitute remedy was provided or (2) whether the legislative action was a reasonable exercise of the legislature's police power in the interest of the general welfare.

Tex.—Lund v. Giauque, 416 S.W.3d 122 (Tex. App. Fort Worth 2013).

Different forms of regulation

Successful defense to imposition of one regulation does not erect constitutional barrier to all other regulation.

U.S.—Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

7 Fla.—Carroll v. State, 361 So. 2d 144 (Fla. 1978).

Pa.—Fantastic Plastic, Inc. v. City of Pittsburgh, 32 Pa. Commw. 41, 377 A.2d 1051 (1977).

Vt.—Beecham v. Leahy, 130 Vt. 164, 287 A.2d 836 (1972).

8 Md.—Kane v. Board of Appeals of Prince George's County, 390 Md. 145, 887 A.2d 1060 (2005).

9 U.S.—Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); Castanza v. Town of Brookhaven, 700 F. Supp. 2d 277 (E.D. N.Y. 2010).

Colo.—People v. Martinez, 165 P.3d 907 (Colo. App. 2007).

Md.—Tyler v. City of College Park, 415 Md. 475, 3 A.3d 421 (2010).

Vt.—State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).

Wash.—State v. Smith, 344 P.3d 1244 (Wash. Ct. App. Div. 2 2015).

Presumption in favor of constitutionality, generally, see §§ 249 to 258.

Matters of local economics and social welfare

The vast majority of governmental action, especially in matters of local economics and social welfare, where state governments exercise a plenary police power, enjoys a strong presumption of validity and must be sustained against an equal protection challenge so long as it bears a rational relation to some legitimate end.

U.S.—Van Der Linde Housing, Inc. v. Rivanna Solid Waste Authority, 507 F.3d 290 (4th Cir. 2007).

Legislative discretion

Where a statute, ordinance, or regulation presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in the legislative discretion, and every presumption is to be indulged in favor of the exercise of that discretion unless arbitrary action is clearly disclosed.

Idaho—Dry Creek Partners, LLC, v. Ada County Com'rs, ex rel. State, 148 Idaho 11, 217 P.3d 1282 (2009).

10 Cal.—Bernstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947).

Ky.—Whitaker v. Green River Coal Co., 276 Ky. 43, 122 S.W.2d 1012, 119 A.L.R. 1456 (1938).

11 Ill.—People ex rel. Heydenreich v. Lyons, 374 Ill. 557, 30 N.E.2d 46, 132 A.L.R. 511 (1940).

Md.—Kane v. Board of Appeals of Prince George's County, 390 Md. 145, 887 A.2d 1060 (2005).

Consideration of economic impact

In determining whether a governmental action is unduly oppressive, so as to exceed police power, court must consider the economic impact of the regulation on the property holder and whether the governmental interference with property could be characterized as a physical intrusion.

Pa.—Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).

12 Minn.—Obara v. Minnesota Dept. of Health, 758 N.W.2d 873 (Minn. Ct. App. 2008).

13 U.S.—Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).

Tenn.—State v. Booher, 978 S.W.2d 953 (Tenn. Crim. App. 1997).

Nature of liberty affected

U.S.—Wall v. King, 206 F.2d 878 (1st Cir. 1953).

Governmental scrutiny of religious beliefs

Mo.—State v. Joos, 120 S.W.3d 778 (Mo. Ct. App. S.D. 2003).

14 N.Y.—People v. Neville, 190 Misc. 2d 432, 737 N.Y.S.2d 251 (J. Ct. 2002).

15 Wash.—State v. Jorgenson, 179 Wash. 2d 145, 312 P.3d 960 (2013).

16 Ind.—Zahm v. Peare, 502 N.E.2d 490 (Ind. Ct. App. 1985).

17 Fla.—State v. Eitel, 227 So. 2d 489 (Fla. 1969).

Ind.—Foreman v. State ex rel. Dept. of Natural Resources, 180 Ind. App. 94, 387 N.E.2d 455 (1979).

18 Ala.—City of Russellville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980).

Md.—Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940).

19 U.S.—Kanelos v. County of Mohave, 893 F. Supp. 2d 1001 (D. Ariz. 2012).

20 U.S.—HRPT Properties Trust v. Lingle, 715 F. Supp. 2d 1115 (D. Haw. 2010).

As to the Contract Clause of United States Constitution, see U.S. Const. Art. I, § 10, cl. 1.

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16A C.J.S. Constitutional Law § 719

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

VIII. Police Power

D. Limitations on Police Power

2. Functions of Legislature and Judiciary

§ 719. Classification of subject matter

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3044, 3058
West's Key Number Digest, States 21(2)

While a legislature may, in the proper exercise of a state's police power, classify the persons to whom a prescribed regulation found to be necessary to the public welfare may apply, or determine whether certain classes of acts may be regulated, the exercise of the power must have some real and substantial relation to the public welfare, and the legislature may not, under the cloak of the police power, exercise a power forbidden by the constitution, or take away rights and privileges expressly guaranteed by the constitution.

The legislature may, in the exercise of its police power, create reasonable classifications in order to eradicate or ameliorate what it perceives to be a social evil[1] and to protect the public health, public morals, public order, public safety, or public welfare;[2] but, a suspect classification may be an invalid exercise of the police power.[3] The classification of occupations,[4] or of other subject matter for regulation under the police power,[5] is primarily within the discretion of the legislature.Whether such a classification is reasonable, however, is a judicial question.[6]

In reviewing the constitutionality of legislative classifications, the sole function of the judiciary is to determine whether, in the exercise of its police power, the legislature has unreasonably encroached upon private rights vouchsafed to the people.[7] For purposes of rational basis review of a classification challenged on equal protection grounds, the legitimate governmental interests of states and municipalities are numerous given their broad police powers.[8] In both equal protection and due process challenges, when a suspect classification is not involved, a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.[9] If a statutory classification bears some rational relationship to a legitimate state end or interest, it is within the legislative power.[10] While a legislature may, in the proper exercise of a state's police power, classify the persons to whom a prescribed regulation found to be necessary to the public welfare may apply or determine whether certain classes of acts may be regulated, the exercise of the power must have some real and substantial relation to the public welfare, and the legislature may not, under the cloak of the police power, exercise a power forbidden by the constitution or take away rights and privileges expressly guaranteed by the constitution.[11] The legislative systems of classification will be declared void by the courts when, and only when, the system prescribed is unquestionably arbitrary and not based on any real or substantial differences.[12] If the legislature makes proper classifications, the reasonableness of its acts must rest in the nature of the subject treated.[13] Administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class.[14]

Footnotes

1 Ala.—Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (rejected on other grounds by, Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003)).

2 Ind.—Zagorac v. State, 943 N.E.2d 384 (Ind. Ct. App. 2011).

3 Neb.—State v. Two IGT Video Poker Games, Model FA 180, 237 Neb. 145, 465 N.W.2d 453 (1991) (disapproved of on other grounds by, American Amusements Co. v. Nebraska Dept. of Revenue, 282 Neb. 908, 807 N.W.2d 492 (2011)).

4 Ga.—Cooper v. Rollins, 152 Ga. 588, 110 S.E. 726, 20 A.L.R. 1105 (1922).
La.—Monteleone v. Seaboard Fire & Marine Ins. Co., 126 La. 807, 52 So. 1032 (1910).

5 U.S.—San Francisco Shopping News Co. v. City of South San Francisco, 69 F.2d 879 (C.C.A. 9th Cir. 1934).
Idaho—State ex rel. Anderson v. Rayner, 60 Idaho 706, 96 P.2d 244 (1939).
Ind.—State v. Griffin, 226 Ind. 279, 79 N.E.2d 537 (1948).
N.J.—State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 A. 116 (Ct. Err. & App. 1935).

6 U.S.—In re Great Western Petroleum Corp., 16 F. Supp. 247 (S.D. Cal. 1936).
Fla.—Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 87 So. 68 (1921).
Ind.—State v. Griffin, 226 Ind. 279, 79 N.E.2d 537 (1948).
N.C.—State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

7 Ala.—Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (rejected on other grounds by, Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003)).

8 Ind.—City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011), aff'd, 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012).

9 Neb.—Citizens of Decatur for Equal Educ. v. Lyons-Decatur School Dist., 274 Neb. 278, 739 N.W.2d 742, 224 Ed. Law Rep. 938 (2007).

10 Colo.—People v. Pharr, 696 P.2d 235 (Colo. 1984).
Pa.—Finucane v. Pennsylvania Milk Marketing Bd., 136 Pa. Commw. 272, 582 A.2d 1152 (1990).

11 Md.—Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008).

12 Ky.—Beacon Liquors v. Martin, 279 Ky. 468, 131 S.W.2d 446 (1939).
Tenn.—Darnell v. Shapard, 156 Tenn. 544, 3 S.W.2d 661 (1928).
No reason or unconstitutional reason

Policy-making body may not act to circumscribe freedom of particular class for no reason or for an unconstitutional reason.

U.S.—U.S. v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969).

13 Wash.—State v. Superior Court for King County, 103 Wash. 409, 174 P. 973 (1918).

14 Pa.—Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235 (1938).

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16A C.J.S. Constitutional Law § 720

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VIII. Police Power

D. Limitations on Police Power

2. Functions of Legislature and Judiciary

§ 720. Emergency legislation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1011, 1111, 1116, 1120, 2484, 2672, 2688, 2737, 3044, 3058, 3902
West's Key Number Digest, States 21(2)

In the case of emergency regulations passed in the exercise of the police power, the legislature is the judge of the necessity therefor, and the courts are generally precluded from questioning their necessity.

In the case of emergency regulations passed in the exercise of the police power, the legislature is the judge of their necessity therefor, and the courts are generally precluded from questioning their necessity.[1] Thus, it is primarily for the legislature to determine whether an emergency justifying the exercise of the police power exists,[2] but the determination of the legislature is subject to judicial review,[3] and the subsistence of the exigency on which the continuation of emergency legislation depends is always open to judicial inquiry.[4]

The existence of an emergency is necessarily a fact question,[5] determinable by record facts, history of current events, and common knowledge and information.[6] The court must give considerable weight to the determination of the legislature that an emergency in fact existed[7] and to declarations of the executive.[8] It is not for the court to pass on the wisdom of the act.[9]

Footnotes

1 Ala.—Franklin v. State ex rel. Alabama State Milk Control Board, 232 Ala. 637, 169 So. 295 (1936).
Cal.—Stockburger v. Jordan, 10 Cal. 2d 636, 76 P.2d 671 (1938).
Md.—Norris v. Mayor and City Council of Baltimore, 172 Md. 667, 192 A. 531 (1937).

2 Ariz.—Pouquette v. O'Brien, 55 Ariz. 248, 100 P.2d 979 (1940).
Me.—Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 8 A.2d 898 (1939).
R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).
Conclusiveness
Legislative finding of emergency because of racial imbalance in public schools is a fact which was not open to judicial reexamination by court.
Mass.—School Committee of Boston v. Board of Ed., 352 Mass. 693, 227 N.E.2d 729 (1967).

3 Ariz.—Pouquette v. O'Brien, 55 Ariz. 248, 100 P.2d 979 (1940).
Miss.—Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).
Matters considered in determination of question
Me.—Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 8 A.2d 898 (1939).

4 Miss.—Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).
N.J.—Safeway Stores v. Botti, 137 N.J.L. 437, 60 A.2d 318 (N.J. Sup. Ct. 1948).

5 Iowa—First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939).
R.I.—Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949).

6 Iowa—First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939).
N.J.—Sbrolla v. Hess, 23 N.J. Misc. 229, 43 A.2d 498 (Cir. Ct. 1945), judgment aff'd, 24 N.J. Misc. 261, 44 A.2d 36 (Sup. Ct. 1945).

7 Iowa—First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939).
N.J.—Sbrolla v. Hess, 23 N.J. Misc. 229, 43 A.2d 498 (Cir. Ct. 1945), judgment aff'd, 24 N.J. Misc. 261, 44 A.2d 36 (Sup. Ct. 1945).
Pa.—Com. v. Perkins, 41 Pa. D. & C. 55, 1941 WL 2903 (C.P. 1941), aff'd, 342 Pa. 529, 21 A.2d 45 (1941), judgment aff'd, 314 U.S. 586, 62 S. Ct. 484, 86 L. Ed. 473 (1942).

8 Iowa—First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441, 120 A.L.R. 932 (1939).

9 N.J.—Sbrolla v. Hess, 23 N.J. Misc. 229, 43 A.2d 498 (Cir. Ct. 1945), judgment aff'd, 24 N.J. Misc. 261, 44 A.2d 36 (Sup. Ct. 1945).
N.Y.—Rapsons Cravats v. Mutual Instrument Corp., 69 N.Y.S.2d 502 (Mun. Ct. 1947).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Certainty and Definiteness
A.L.R. Index, Constitutional Law
A.L.R. Index, First Amendment
A.L.R. Index, Overbreadth
A.L.R. Index, Police Power
West's A.L.R. Digest, Constitutional Law 580 to 651, 1050, 1052, 1065, 1067, 1150, 1151, 1156 to 1163, 1178, 4135

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16A C.J.S. Constitutional Law § 721

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IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

a. Definitions and Nature of Rights and Freedoms

§ 721. Basic and natural rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050, 1065

Basic or natural rights, which are inherent and inalienable, exist notwithstanding there is no specific enumeration of such rights in the federal and state constitutions.

The term "right" in civil society is defined to mean that which a person is entitled to have, to do, or to receive from others, within the limits prescribed by law.[1] The entire social and political structure of the United States rests on the cornerstone that all people have certain basic rights which are inherent and inalienable and which exist notwithstanding there is no specific enumeration of such rights in state constitutions.[2]

Natural rights include the right of personal liberty, personal security, and the right to acquire and enjoy property.[3] Constitutions are not the sources of such personal rights,[4] inasmuch as our theory of government is that the people, in full possession of inherent, inalienable rights, formed the government in order to protect these rights,[5] and incorporated such rights into the organic law as a shield against unwarrantable interference by any department of government.[6] Natural law rights, therefore, in and of

themselves, have no legal force.[7] It is, rather, the laws enacted by the legislatures that define such rights of the individual,[8] and provide him or her certain remedies, although enumerated constitutional provisions do act as a limitation on the power of the government to infringe upon many such natural rights.[9]

Civil liberties.

Civil liberties are natural rights which appertain originally and essentially to each person as a human being and are inherent in his or her nature.[10] Such natural rights, which are constitutionally protected, are not actually rights but immunities or restraints on government.[11] Thus, a civil liberty may also be defined as a natural liberty restrained by human laws only as necessary and expedient for the general welfare.[12]

Footnotes

1 Neb.—Atchison & N.R. Co. v. Baty, 6 Neb. 37, 1877 WL 3552 (1877) (overruled in part on other grounds by, Graham v. Kibble, 9 Neb. 182, 2 N.W. 455 (1879)).

2 Minn.—Thiede v. Town of Scandia Valley, 217 Minn. 218, 14 N.W.2d 400 (1944).

3 N.J.—Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940).
As to the right of personal liberty, generally, see §§ 777 to 812.
As to the right of personal security, generally, see §§ 851 to 854.
As to the right to acquire and enjoy property, generally, see §§ 845 to 850.

4 Ky.—Mansbach Scrap Iron Co. v. City of Ashland, 235 Ky. 265, 30 S.W.2d 968 (1930).
As to the definition and nature of constitutional rights, generally, see § 722.

5 Va.—Richmond, F. & P.R. Co. v. City of Richmond, 145 Va. 225, 133 S.E. 800 (1926).

6 Fla.—State v. City of Avon Park, 108 Fla. 640, 144 So. 306 (1932).

7 Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

8 Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

9 Pa.—Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 512 Pa. 23, 515 A.2d 1331 (1986).

10 Ohio—Sowers v. Ohio Civil Rights Commission, 20 Ohio Misc. 115, 49 Ohio Op. 2d 203, 252 N.E.2d 463 (C.P. 1969).

11 Iowa—Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758 (Iowa 1971).
As to the definition and nature of natural rights, generally, see § 721.

12 Ill.—People v. Shephard, 152 Ill. 2d 489, 178 Ill. Dec. 724, 605 N.E.2d 518 (1992).

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IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

a. Definitions and Nature of Rights and Freedoms

§ 722. Constitutional freedoms or rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050, 1065

Constitutional rights cannot be created by statutes or rules, nor can they be abolished by executive or judicial action, and such rights, as well as constitutional freedoms, are guarded from attack or interference by the legislature or any other governmental agent of the state.

Constitutional rights cannot be created by statutes or rules, nor can they be abolished by executive or judicial action.[1] A constitutional right differs from a right conferred by the common law or by statute only in the fact that it is guarded from any attack or interference by the legislature or any other governmental agent of the state.[2] A "constitutional freedom," defined as something more than liberty permitted and consisting of civil and political rights, is similarly absolutely guaranteed, assured, and guarded.[3]

The Federal Constitution is a charter of negative liberties; it tells the state to let people alone but does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.[4] Accordingly, since the

state is under no constitutional duty to provide substantive services for its residents,[5] it is not required to finance the exercise of a fundamental right.[6] Furthermore, a refusal to fund a constitutionally protected activity, without more, cannot be equated with the imposition of a penalty on that activity.[7]

Constitutional rights are not denied or impaired by the encouragement of alternative activity through the allocation of public funds.[8]

Footnotes

1 Miss.—Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 67 Ed. Law Rep. 844 (Miss. 1991).
Enacting laws
A state does not create new constitutional rights by enacting laws designed to protect existing constitutional rights.
U.S.—James v. Rowlands, 606 F.3d 646 (9th Cir. 2010).

2 Ky.—Sanitation Dist. No. 1 of Jefferson County v. City of Louisville, 308 Ky. 368, 213 S.W.2d 995 (1948).

3 Mich.—People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 1871 WL 3042 (1871).
Freedom to excel
N.J.—Dragwa v. Federal Labor Union No. 23070, 136 N.J. Eq. 172, 41 A.2d 32 (Ch. 1945).

4 Ill.—Lewis E. v. Spagnolo, 186 Ill. 2d 198, 238 Ill. Dec. 1, 710 N.E.2d 798, 141 Ed. Law Rep. 222 (1999).

5 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).
Medical care
No person has a constitutional right to have the state pay for his or her medical care.
N.C.—Rosie J. v. North Carolina Dept. of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (1997).

6 U.S.—Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), judgment aff'd, 428 U.S. 901, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

7 U.S.—Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

8 U.S.—Woe v. Califano, 460 F. Supp. 234 (S.D. Ohio 1978).

16A C.J.S. Constitutional Law § 723

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IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

a. Definitions and Nature of Rights and Freedoms

§ 723. Fundamental rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1052

Fundamental rights are those rights which have their origin in the express terms of a constitution or which are necessarily implied from those terms.

Fundamental rights are those rights which have their origin in the express terms of a constitution or which are necessarily implied from those terms.[1] Fundamental rights, therefore, include those rights recognized as indispensable to the enjoyment of rights explicitly defined,[2] that is, a right without which other constitutionally guaranteed rights would have little meaning.[3] Fundamental rights under the United States Constitution are those listed in the Bill of Rights, as well as certain unenumerated rights, such as the right to privacy.[4]

A fundamental right cannot be based on the social or economic importance of an interest.[5] In determining whether a fundamental right exists, the court must look to the traditions and collective conscience of the people[6] though fundamental rights cannot be

abolished by contrary judicial practices, no matter how long they have continued.[7] It is also not proper for courts to pick out certain other rights and characterize them as fundamental.[8]

Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[9]

Footnotes

1 N.M.—State ex rel. Gesswein v. Galvan, 1984-NMSC-025, 100 N.M. 769, 676 P.2d 1334 (1984).
Va.—Ballard v. Com., 228 Va. 213, 321 S.E.2d 284 (1984).
Guaranteed, explicitly or implicitly, by constitution
Haw.—Applications of Herrick, 82 Haw. 329, 922 P.2d 942 (1996).
Not every right secured by state or federal constitution is fundamental
Ill.—Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 83 Ill. Dec. 308, 470 N.E.2d 266 (1984).

2 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).
Fact fundamental right not enumerated not impediment to its existence
Cal—People v. Belous, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

3 Mont.—State v. McCarthy, 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (2004).
New fundamental right
To establish a new fundamental right protected by the Constitution, the court must determine that the right is deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.
U.S.—Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), judgment aff'd, 755 F.3d 1193 (10th Cir. 2014), cert. denied, 135 S. Ct. 265, 190 L. Ed. 2d 138 (2014).

4 U.S.—Estate of Radames Tejada v. Flores, 596 F. Supp. 2d 205 (D.P.R. 2009).

5 N.J.—Cold Indian Springs Corp. v. Ocean Tp., 154 N.J. Super. 75, 380 A.2d 1178 (Law Div. 1977), judgment aff'd, 161 N.J. Super. 586, 392 A.2d 175 (App. Div. 1978), judgment aff'd, 81 N.J. 502, 410 A.2d 652 (1980).

6 N.J.—State v. Nugent, 125 N.J. Super. 528, 312 A.2d 158 (App. Div. 1973).
Crucial guideposts
In determining whether a right is fundamental, the nation's history, legal traditions, and practices provide the crucial guideposts for responsible decisionmaking.
Idaho—State v. Doe, 148 Idaho 919, 231 P.3d 1016 (2010).

7 Okla.—Ricks Exploration Co. v. Oklahoma Water Resources Bd., 1984 OK 73, 695 P.2d 498 (Okla. 1984).

8 U.S.—Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), judgment aff'd, 410 U.S. 976, 93 S. Ct. 1502, 36 L. Ed. 2d 173 (1973).

9 U.S.—Hamby v. Parnell, 2014 WL 5089399 (D. Alaska 2014).

16A C.J.S. Constitutional Law § 724

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

b. Constitutional Guaranties

(1) In General

§ 724. Constitutional guaranties, generally; enumerated and unenumerated rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 617, 1050, 1065

The basic principle of the American constitutional system is that all political power is inherent in the people and that this inherent power is exercised by the people under a constitution adopted by them.

The basic principle of the American constitutional system is that all political power is inherent in the people and that this inherent power is exercised by the people under a constitution adopted by them.[1] Rights constitutionally guaranteed are generally those specifically enumerated in the constitution or which existed at common law or by statute at the time the constitution is adopted.[2] Accordingly, the Federal Constitution guarantees more than simply freedom from those abuses which led the framers of the Federal Constitution to single out particular rights.[3] Certain important, but inarticulated rights, share constitutional protection in common with explicit guaranties.[4] Both the concept of penumbral guaranties and the Ninth Amendment[5] support the existence of rights not explicitly mentioned in the Federal Constitution.[6] In order, however, for a claimed activity to be given constitutional

protection, as within the penumbra of a constitutional right, it is necessary that the activity be essential to the free exercise of a constitutionally protected right.[7]

A state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution[8] and afford them greater protection than is provided under the Federal Constitution.[9] The rights so guaranteed may be more expansive than their federal counterparts.[10] A constitutional entitlement cannot, however, be created, as if by estoppel, merely because a wholly and expressly discretionary state privilege has been granted generously in the past.[11] The individual rights embodied in a state constitution are no less zealously guarded than federal constitutional rights.[12]

While constitutional privileges are accorded a broad scope commensurate with their purposes,[13] with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right.[14] The characterization of a governmental benefit as a "right" or "privilege" is not determinative of constitutional rights.[15]

Protection of rights from state action.

Where provided, state constitutional provisions insure protection against individual or group interference as well as against encroachment by governmental departments.[16] In other states, as with the Federal Constitution,[17] constitutional provisions apply only to state action.[18] Legal rights may, in some instances, be violated by unlawful public action even though such action makes no direct demands on the individual.[19]

CUMULATIVE SUPPLEMENT

Cases:

While provisions of the state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions, analysis of a section of the federal constitution is strongly persuasive in construing the like section of the state constitution. State v. Nathan, 522 S.W.3d 881 (Mo. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—State ex rel. Ayres v. Gray, 69 So. 2d 187 (Fla. 1953).
As to the nature and authority of constitutions, generally, see § 5.

2 Idaho—Craig v. Lane, 60 Idaho 178, 89 P.2d 1008 (1939) (overruled in part on other grounds by, Coffin v. Cox, 78 Idaho 111, 298 P.2d 742 (1956)).

3 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

4 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

5 U.S. Const. Amend. IX.

6 U.S.—U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982).

7 Mo.—Association for Educational Development v. Hayward, 533 S.W.2d 579 (Mo. 1976).

8 Pa.—Com. v. Hess, 532 Pa. 607, 617 A.2d 307 (1992).

9 Mont.—State v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43 (2012).

N.D.—State v. Loh, 2010 ND 66, 780 N.W.2d 719 (N.D. 2010).

Pa.—Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 512 Pa. 23, 515 A.2d 1331 (1986).

More specific and broader protection

La.—State v. Perry, 610 So. 2d 746 (La. 1992).

Imposition of stricter standards

N.J.—Ott v. Board of Ed. of Hamilton Tp., 160 N.J. Super. 333, 389 A.2d 1001 (App. Div. 1978).

Construction and interpretation

(1) In determining whether a state constitution should be considered as extending broader rights to its citizens than does the United States Constitution, the court should consider the textual language of the state constitution, differences in the texts, constitutional history, preexisting state law, structural differences, and matters of particular state or local concern.

Wyo.—Norgaard v. State, 2014 WY 157, 339 P.3d 267 (Wyo. 2014).

(2) When neither party argues that the state constitution offers greater free exercise of speech or religion protection than does the federal constitution, an appellate court treats the state and federal guarantees as coextensive.

Tex.—State v. Valerie Saxion, Inc., 450 S.W.3d 602 (Tex. App. Fort Worth 2014).

10 U.S.—PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

Conn.—State v. Waller, 223 Conn. 283, 612 A.2d 1189 (1992).

11 U.S.—Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

12 Mich.—People v. Mulier, 12 Mich. App. 28, 162 N.W.2d 292 (1968).

13 Conn.—Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (Super. Ct. 1976).

14 Cal.—Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).

15 U.S.—Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).

Ariz.—State v. Smith, 112 Ariz. 416, 542 P.2d 1115, 77 A.L.R.3d 661 (1975).

16 Ky.—Chapman v. Commonwealth, 294 Ky. 631, 172 S.W.2d 228 (1943).

As to limitations and restrictions on constitutional guarantees, generally, see §§ 730 to 734.

Coercion to join union

Wyo.—Hagen v. Culinary Workers Alliance Local No. 337, 70 Wyo. 165, 246 P.2d 778 (1952).

17 Md.—Miller v. Fairchild Industries, Inc., 97 Md. App. 324, 629 A.2d 1293 (1993).

18 Md.—Miller v. Fairchild Industries, Inc., 97 Md. App. 324, 629 A.2d 1293 (1993).

Minn.—State v. Wicklund, 589 N.W.2d 793 (Minn. 1999).

19 U.S.—Bauer v. Acheson, 106 F. Supp. 445 (D. D.C. 1952).

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A. In General

1. General Principles

b. Constitutional Guaranties

(1) In General

§ 725. Bills of rights; state and federal

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1067

A bill of rights, whether state or federal, guarantees the preservation of the people's rights against invasion by the government or any branch of the government.

A bill of rights, whether state or federal, is generally a remedy which protects an individual against invasion by the government[1] or any branch of the government.[2] It is not, however, designed to protect citizens from the invasion of certain fundamental rights by individuals.[3]

The purpose of the federal Bill of Rights[4] is to protect the people against arbitrary and discriminatory use of political power.[5] Broadly stated, the very purpose of the bill of rights is to withdraw certain subjects from the vicissitudes of political controversy, place them beyond the reach of majorities and officials, and establish them as legal principles to be applied by the courts.[6] These fundamental rights guaranteed in the bill of rights may not be submitted to a vote and do not depend on the outcome of

an election.[7] Such rights must be zealously guarded so that they may not be whittled away through minor seemingly innocuous intrusions.[8]

A state's bill of rights generally guarantees the preservation of the people's natural rights[9] and is, in some jurisdictions, characterized as the supreme law of the land so that nothing else in the state constitution may properly be construed as a limitation, restriction, or modification of any fundamental rights.[10] While some state constitutional provisions safeguarding personal rights are substantially equivalent[11] to the guaranties of the Fourteenth Amendment to the Federal Constitution,[12] in other states, the bill of rights is a source of important rights not federally protected, such as the right to a jury trial in civil cases and indictment by a grand jury.[13]

CUMULATIVE SUPPLEMENT

Cases:

The Fifth Amendment applies only to the federal government or federal actions and does not apply to state and municipality actors. U.S. Const. Amend. 5. Jackson v. Stair, 938 F.3d 966 (8th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Alabama Exchange Bank v. U.S., 373 F. Supp. 1221 (M.D. Ala. 1974).
Protection from governmental transgressions of certain fundamental rights
Tex.—Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997).

2 Mass.—Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1955).

3 Tex.—Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997).
Inapplicable to disputes between private parties
U.S.—Marshall v. Honeywell Technology Solutions, Inc., 536 F. Supp. 2d 59 (D.D.C. 2008).

4 U.S. Const. Amends. I to X.

5 U.S.—Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

6 U.S.—West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).
Even when government acts in good faith
The Bill of Rights was made a part of the Constitution to protect individuals from violations of certain fundamental rights by the government even when the government acts in a good faith pursuit of the interests of the majority.
U.S.—U.S. v. Grant, 524 F. Supp. 2d 1204 (C.D. Cal. 2007), vacated in part on other grounds, 312 Fed. Appx. 39 (9th Cir. 2009).

7 U.S.—Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).

8 U.S.—Matter of Wood, 430 F. Supp. 41 (S.D. N.Y. 1977).

9 Pa.—Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 512 Pa. 23, 515 A.2d 1331 (1986).

10 Ky.—Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966).

11 Mass.—Attorney General v. Brissenden, 271 Mass. 172, 171 N.E. 82 (1930).

N.J.—State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 A. 116 (Ct. Err. & App. 1935).

12 U.S. Const. Amend. XIV.

13 Del.—Helman v. State, 784 A.2d 1058 (Del. 2001).

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16A C.J.S. Constitutional Law § 726

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A. In General

1. General Principles

b. Constitutional Guaranties

(1) In General

§ 726. Function of court to protect rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

Courts must protect the personal rights guaranteed by state and federal constitutions.

Courts must be ever watchful to protect the personal rights guaranteed by state and federal constitutions.[1] They are held to a standard of vigilance with respect to the protection of an individual's constitutional liberties[2] and have a critical duty to protect a minority against a majority's attempt to reduce human rights.[3] Courts must, therefore, afford all persons all statutory and constitutional rights to which they are entitled,[4] and they may not engage in any action which deprives a party before it of his or her constitutional rights.[5] Accordingly, constitutional rights cannot be made dependent on the favor of the court but may be asserted as a matter of right.[6]

A state court may not, under a state constitution, restrict the rights of its citizens contrary to the rights granted by the Federal Constitution but may grant to its citizens broader and more comprehensive rights under the state constitution than are allowed

by the Federal Constitution.[7] It is the duty of the federal courts to determine whether resulting restrictions on a person's freedom may be tolerated when the exercise of an enumerated power of Congress conflicts with individual liberties protected by the federal bill of rights.[8]

In the matter of safeguarding constitutional rights, the courts must generally look to the substance rather than the technical forms of procedure taken to invoke the protection of the law.[9]

CUMULATIVE SUPPLEMENT

Cases:

A criminal prosecution continues and the defendant remains an accused with all the rights provided by the Sixth Amendment until a final sentence is imposed. (Per Justice Gorsuch, with three Justices concurring and one Justice concurring in the judgment.) U.S. Const. Amend. 6. United States v. Haymond, 139 S. Ct. 2369 (2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Byars v. U.S., 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927).
Fla.—Nowlin v. State, 346 So. 2d 1020 (Fla. 1977).
Bill of Rights must be zealously guarded and states' powers recognized
U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).

2 Alaska—Breese v. Smith, 501 P.2d 159 (Alaska 1972).

3 U.S.—Greenberg v. Bolger, 497 F. Supp. 756 (E.D. N.Y. 1980).

4 Fla.—Fazio v. State, 399 So. 2d 432 (Fla. 5th DCA 1981).

5 U.S.—In re Baldinger, 356 F. Supp. 153, 28 A.L.R. Fed. 911 (C.D. Cal. 1973) (rejected on other grounds by, In re Grand Jury Proceedings, 509 F.2d 1349 (5th Cir. 1975)).

6 Ill.—People v. Humphreys, 353 Ill. 340, 187 N.E. 446 (1933).

7 Tenn.—Merchants Bank v. State, Wildlife Resources Agency, 567 S.W.2d 476 (Tenn. Ct. App. 1978).

8 U.S.—U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).

9 Fla.—Dickoff v. Dewell, 152 Fla. 240, 9 So. 2d 804 (1942).

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A. In General

1. General Principles

b. Constitutional Guaranties

(1) In General

§ 727. Construction of rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 580 to 651

Constitutional rights are coequal and must be harmonized with each other and given a reasonable construction, and provisions for the security of person and property must be liberally construed.

All constitutional rights are coequal and must be harmonized with each other and no one such right may be permitted to override or submerge another.[1] In accordance with the rules governing the construction of constitutional provisions, generally, the construction given to a right guaranteed to the individual by the constitution must always be a reasonable one.[2] When reviewing a constitutional provision, it is the court's responsibility to give a reasonable construction to each provision, give effect to each provision, and construe them together to make them harmonious and workable.[3] Constitutional provisions, designed for the preservation and security of the elementary rights of life, liberty, and property, must be construed liberally[4] and with reference to what were considered the natural rights of individuals under the common law existing at the adoption of the constitution.[5]

The first 10 amendments to the Federal Constitution were not intended to lay down any novel principles of government but simply to embody certain guaranties and immunities inherited from our English ancestors and which had, from time immemorial, been subject to well-recognized exceptions, arising from the necessities of particular actions.[6] These exceptions continue to be recognized as if formally expressed.[7] Freedoms of the bill of rights must also be read, not in opposition to the safeguards of amendments adopted after the Civil War but in harmony with them.[8]

State courts, through an interpretation of their constitutions, may properly expand the individual liberties of their citizens beyond those conferred by the Federal Constitution.[9]

Flexibility in application.

The meaning of constitutional guaranties never varies, but the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[10] The degree of a constitutional guaranty must, therefore, be determined in the light of the social and economic conditions prevailing at the time the guaranty is proposed to be exercised rather than at the time it was approved.[11]

CUMULATIVE SUPPLEMENT

Cases:

When interpreting the state constitution, Supreme Court's task is to read the laws as they are written, and interpret them in accordance with established principles of constitutional construction. Town of Lead Hill v. Ozark Mountain Regional Public Water Authority of State, 2015 Ark. 360, 472 S.W.3d 118 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Boynton v. State, 64 So. 2d 536 (Fla. 1953).
No hierarchy of rights
Neb.—State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975), judgment rev'd on other grounds, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

2 Mont.—State v. Rathbone, 110 Mont. 225, 100 P.2d 86 (1940).
As to the rules governing the construction of constitutions, generally, see §§ 77 to 113.

3 S.D.—In re Daugaard, 2011 SD 44, 801 N.W.2d 438 (S.D. 2011).

4 U.S.—Byars v. U.S., 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927).
Or.—State ex rel. Gladden v. Lonergan, 201 Or. 163, 269 P.2d 491 (1954).

5 Ala.—Ex parte Wetzel, 243 Ala. 130, 8 So. 2d 824 (1942).

6 U.S.—Robertson v. Baldwin, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).
Extradition of citizens
U.S.—Neely v. Henkel, 180 U.S. 109, 21 S. Ct. 302, 45 L. Ed. 448 (1901).

7 U.S.—Robertson v. Baldwin, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

8 U.S.—Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), judgment aff'd, 404 U.S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971).

9 Conn.—Cologne v. Westfarms Associates, 37 Conn. Supp. 90, 442 A.2d 471 (Super. Ct. 1982).

10 U.S.—Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).
Fla.—City of Coral Gables v. Crandon, 157 Fla. 71, 25 So. 2d 1 (1946).
As to the nature and scope of constitutional guarantees, generally, see §§ 724 to 734.

Constitutional guaranties evolve over time

Tex.—City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996).

11 Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).

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16A C.J.S. Constitutional Law § 728

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A. In General

1. General Principles

b. Constitutional Guaranties

(2) To Whom Available

§ 728. To whom constitutional guaranties are available, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050

Constitutional guaranties apply to all alike and must not be withheld in the slightest degree, even from those under suspicion of violating the law.

Generally, constitutional guaranties pertaining to personal rights are available to all alike,[1] and must not be withheld in the slightest degree, even from those under suspicion of violating the law.[2] More specifically, the constitutional guaranties apply to every individual within the territorial jurisdiction of the United States, irrespective of age.[3] The personal guaranties are available to citizens and resident noncitizens alike.[4] Constitutional provisions relating to the rights of an accused in a criminal prosecution applies only to persons accused of crime.[5]

Whether a constitutional right is available to corporations depends on the nature, history, and purpose of the particular constitutional provision.[6] Generally, however, the First Amendment[7] applies to corporations, and their activities,[8] as well as unincorporated associations.[9] Constitutional rights do not, however, apply to municipal corporations.[10]

Footnotes

1 Cal.—In re Garth D., 55 Cal. App. 3d 986, 127 Cal. Rptr. 881 (4th Dist. 1976).
Not limited to persons accused of crime
Cal.—In re Watson, 91 Cal. App. 3d 455, 154 Cal. Rptr. 151 (4th Dist. 1979).

2 Mich.—People v. Mulier, 12 Mich. App. 28, 162 N.W.2d 292 (1968).

3 U.S.—Nieves v. U.S., 280 F. Supp. 994 (S.D. N.Y. 1968).
As to the application of constitutional guaranties to minors, generally, see § 729.

4 U.S.—Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972).
Each liberty specified in First Amendment
U.S.—U.S. v. Korner, 56 F. Supp. 242 (S.D. Cal. 1944).

5 R.I.—Sepe v. Daneker, 76 R.I. 160, 68 A.2d 101 (1949).

6 U.S.—Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013); SBC Communications, Inc. v. F.C.C., 981 F. Supp. 996 (N.D. Tex. 1997), judgment rev'd on other grounds, 154 F.3d 226 (5th Cir. 1998).

7 U.S. Const. Amend. I.

8 U.S.—Universal Amusement Co., Inc. v. Vance, 587 F.2d 159 (5th Cir. 1978), judgment aff'd, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).

9 U.S.—Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), judgment modified on other grounds, 676 F.2d 1023 (5th Cir. 1982) (disapproved of on other grounds by, Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984)).

10 Tenn.—City of Knoxville v. State ex rel. Hayward, 175 Tenn. 159, 133 S.W.2d 465 (1939).

16A C.J.S. Constitutional Law § 729

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

b. Constitutional Guaranties

(2) To Whom Available

§ 729. Minors as constitutionally protected

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1062

Minors are constitutionally protected and possess constitutional rights.

Broadly stated, minors are constitutionally protected and possess constitutional rights[1] and are not excluded from the constitutional protections merely because they are minors.[2] Accordingly, minors are protected by the bill of rights.[3] Minors do not, however, possess all the personal liberties accorded to adults by the bill of rights,[4] and their rights may be curtailed where the state acts to protect them from their own incapacity to fend for themselves.[5] Thus, the constitutional rights of adults and minors are not necessarily coextensive.[6] The peculiar vulnerability of children, their inability to make critical decisions in an informed and mature manner, and the importance of the parental role in child rearing are all reasons why the constitutional rights of children cannot be equated with those of adults.[7] A state may, therefore, properly adjust its legal system to account for children's vulnerability and their needs for concern, sympathy, and paternal attention.[8]

Footnotes

1 U.S.—Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).
Colo.—In re Marriage of Hartley, 886 P.2d 665 (Colo. 1994).
Rights independent of those afforded parents
U.S.—Schleiffer v. Meyers, 644 F.2d 656 (7th Cir. 1981).

2 U.S.—Population Services Intern. v. Wilson, 398 F. Supp. 321 (S.D. N.Y. 1975), judgment aff'd, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).
Md.—Ashton v. Brown, 339 Md. 70, 660 A.2d 447 (1995).
Wyo.—Hageman v. Goshen County School Dist. No. 1, 2011 WY 91, 256 P.3d 487, 269 Ed. Law Rep. 345 (Wyo. 2011).
Infant has no constitutional rights until birth
U.S.—Ruiz Romero v. Gonzalez Caraballo, 681 F. Supp. 123 (D.P.R. 1988).

3 U.S.—McConnell v. Federal Election Com'n, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)); Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
First Amendment
Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. While states no doubt possess legitimate power to protect children from harm, that does not include a free-floating power to restrict ideas to which children may be exposed.
U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

4 U.S.—Schleiffer v. Meyers, 644 F.2d 656 (7th Cir. 1981).

5 U.S.—T H v. Jones, 425 F. Supp. 873 (D. Utah 1975), judgment aff'd in part on other grounds, 425 U.S. 986, 96 S. Ct. 2195, 48 L. Ed. 2d 811 (1976).

6 U.S.—Goldstein v. Spears, 536 F. Supp. 606 (N.D. Ill. 1982).

7 U.S.—Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).
Inability to make decisions in an informed and mature manner
Fla.—L.S. v. State, 120 So. 3d 55 (Fla. 4th DCA 2013).
Traditional state deference to parental autonomy in child rearing
Pa.—In re F.C. III, 607 Pa. 45, 2 A.3d 1201 (2010).

8 U.S.—Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).
Idaho—State v. Doe, 148 Idaho 919, 231 P.3d 1016 (2010).
Adjustment of definition of obscenity to social realities
U.S.—Ginsberg v. State of N. Y., 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968).

16A C.J.S. Constitutional Law § 730

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

b. Constitutional Guaranties

(3) Limitations and Restrictions on Guaranties

§ 730. Individual rights as less than absolute

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050

The rights of individuals, guaranteed by the various constitutions, are not absolute or limitless and may not be exercised under any and all circumstances without qualification.

Under the American system of laws and government, everyone is required so to use and enjoy his or her own constitutional rights so as not to injure others in their rights or to violate any law in force for the preservation of the general welfare.[1] The rights of individuals, guaranteed by the various constitutions, are not, however, absolute or limitless[2] and may not be exercised under any and all circumstances without qualification.[3] Thus, the assertion of a constitutional right does not absolve the asserter from performance of his or her own duties and obligations,[4] nor does it permit him or her to violate the reasonable and constitutional rights of others.[5] Additionally, such rights must, at times, give way when they are in conflict with rights granted for the protection, safety, and general welfare of the public.[6] Accordingly, constitutional rights must be considered in

connection with the duties and obligations of citizenship[7] and are acquired and enjoyed subject to the exercise of the regulatory powers of government.[8]

Footnotes

1 Fla.—State ex rel. Hosack v. Yocum, 136 Fla. 246, 186 So. 448, 121 A.L.R. 270 (1939).
Protected rights of others
Ky.—Chapman v. Commonwealth, 294 Ky. 631, 172 S.W.2d 228 (1943).

2 U.S.—Alma Soc. Inc. v. Mellon, 459 F. Supp. 912 (S.D. N.Y. 1978), judgment aff'd, 601 F.2d 1225 (2d Cir. 1979).
Ill.—In re J.W., 204 Ill. 2d 50, 272 Ill. Dec. 561, 787 N.E.2d 747 (2003).
Ind.—Tender Loving Care Management, Inc. v. Sherls, 14 N.E.3d 67 (Ind. Ct. App. 2014).
Mass.—Com. v. Weston W., 455 Mass. 24, 913 N.E.2d 832 (2009).

3 U.S.—Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

4 U.S.—McAlpine v. Reese, 309 F. Supp. 136 (E.D. Mich. 1970).

5 U.S.—McAlpine v. Reese, 309 F. Supp. 136 (E.D. Mich. 1970).
Vindication of right by requiring another to forego right impermissible
D.C.—Littlejohn v. U.S., 705 A.2d 1077 (D.C. 1997).
Constitutional rights to invade the rights of others prohibited
Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).

6 U.S.—Ex parte Lincoln Seiichi Kanai, 46 F. Supp. 286 (E.D. Wis. 1942).
Ill.—In re J.W., 204 Ill. 2d 50, 272 Ill. Dec. 561, 787 N.E.2d 747 (2003).
As to the exercise of police powers by the state, generally, see §§ 699 to 720.

7 Ala.—Opinion of the Justices, 252 Ala. 351, 40 So. 2d 849 (1949).

8 Ohio—Kraus v. City of Cleveland, 163 Ohio St. 559, 57 Ohio Op. 1, 127 N.E.2d 609 (1955).

16A C.J.S. Constitutional Law § 731

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A. In General

1. General Principles

b. Constitutional Guaranties

(3) Limitations and Restrictions on Guaranties

§ 731. Individual rights as less than absolute—Governmental interference or infringement

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050

While constitutions generally protect against governmental invasions of individual rights, constitutional guarantees do not withdraw from the government the power to safeguard its vital interest and do not prohibit all restrictions of protected rights.

Freedom from governmental restraint lies at the heart of the American system of government and is a fundamental right.[1] Thus, a legislature may not enact a law which would have the practical effect of depriving a person of his or her rights secured by the Federal Constitution.[2] The United States Constitution does not, however, recognize absolute and uncontrollable liberty, and society is free to enact laws against evils which menace health, safety, morals, and welfare of people.[3] Thus, while the Federal Constitution protects against invasions of individual rights, it does not withdraw from the government the power to safeguard its vital interest[4] and does not prohibit all restrictions of protected rights.[5] The government may not, however, prohibit or control the conduct of a person for reasons that infringe upon constitutionally guaranteed freedoms.[6]

The mere statement of fundamental guaranties in constitutions is a prohibition by necessary implication of legislation or conduct inconsistent with such guaranties and renders the legislation or conduct void.[7] Thus, if a law impinges upon a fundamental right explicitly or implicitly secured by a constitution, it is presumptively unconstitutional.[8]

Rights guaranteed by one clause of a constitution may not be overridden by power exercised by the legislature pursuant to another part of that constitution,[9] and once a benefit has been conferred, it may not be denied for constitutionally impermissible reasons.[10] The exercise of constitutional rights may not be foreclosed by mere labels.[11] Further, the mere assertion of constitutional rights,[12] even where such assertion invites illegal conduct,[13] may not be a basis for the deprivation of such rights.

Charge or fee.

The state generally may not impose a charge for enjoyment of a right granted by the Federal Constitution.[14] The state may, however, properly impose a nominal fee as a regulatory measure to defray the expenses of policing the activities in question.[15]

Footnotes

1 Mass.—Aime v. Com., 414 Mass. 667, 611 N.E.2d 204 (1993).
Public interest in preserving rights against governmental infringement paramount
N.H.—New Hampshire Motor Transport Ass'n v. State, 150 N.H. 762, 846 A.2d 553 (2004).

2 N.M.—Wells v. Valencia County, 1982-NMSC-048, 98 N.M. 3, 644 P.2d 517 (1982).
Statute may not unnecessarily chill exercise of constitutional rights
Ky.—State Bd. for Elementary and Secondary Educ. v. Howard, 834 S.W.2d 657, 76 Ed. Law Rep. 1211 (Ky. 1992).
Wash.—State v. Martin, 151 Wash. App. 98, 210 P.3d 345 (Div. 1 2009), aff'd on other grounds, 171 Wash. 2d 521, 252 P.3d 872 (2011).

3 Neb.—State ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991) (disapproved of on other grounds by, American Amusements Co. v. Nebraska Dept. of Revenue, 282 Neb. 908, 807 N.W.2d 492 (2011)).
As to the exercise of police powers by a state, generally, see §§ 699 to 720.

4 U.S.—U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).
As to constitutional protection against the invasion of individual rights, generally, see §§ 730 to 734.

5 U.S.—Dike v. School Bd. of Orange County, Fla., 650 F.2d 783 (5th Cir. 1981) (overruled on other grounds by, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997)).

6 Alaska—Kenai Peninsula Borough School Dist. v. Kenai Peninsula Borough School Dist. Classified Ass'n, 590 P.2d 437 (Alaska 1979).
As to the proper extent of limitations or restrictions on constitutional guarantees by the government, generally, see §§ 730 to 734.

7 Tex.—International Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776 (Tex. Civ. App. Amarillo 1954), judgment aff'd, 156 Tex. 340, 295 S.W.2d 412 (1956).
Presumption of validity
Ala.—Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568 (1918).
Measurement of rights
Fla.—Cawthon v. Town of De Funiak Springs, 88 Fla. 324, 102 So. 250 (1924).

8 Fla.—North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003).

9 U.S.—Faulkner v. Clifford, 289 F. Supp. 895 (E.D. N.Y. 1968).

10 U.S.—Gilbreath v. East Arkansas Planning and Development Dist., Inc., 471 F. Supp. 912 (E.D. Ark. 1979).
As to the propriety of certain restrictions on constitutional guarantees, generally, see §§ 732 to 734.

11 U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

12 Or.—State v. Gressel, 276 Or. 333, 554 P.2d 1014 (1976).

13 U.S.—Gay Students Organization of University of New Hampshire v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974), judgment modified on other grounds, 509 F.2d 652 (1st Cir. 1974).

14 U.S.—Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).
N.D.—City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981).

15 U.S.—Milwaukee Mobilization for Survival v. Milwaukee County Park Commission, 477 F. Supp. 1210 (E.D. Wis. 1979).
As to the exercise of a state's police power by the imposition of a fee, generally, see § 703.

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16A C.J.S. Constitutional Law § 732

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(3) Limitations and Restrictions on Guaranties

§ 732. Lack of justification for limitation or restriction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050, 1052

Numerous grounds are insufficient to justify a limitation or restriction of constitutional guarantees.

A denial of constitutional rights may not be justified by inadequate resources or the saving of expense[1] or upon the fact that implementation may require expenditure of public funds.[2] Such rights also may not be limited or denied simply because of a lack of implementing legislation[3] or mere inconvenience.[4]

Compliance with a statute cannot justify the improper invasion of constitutional rights,[5] and the fundamental rights protected by constitutional guaranties may not be transgressed with impunity or be disregarded because of expediency.[6] Thus, avoidance of delay cannot justify a tolerance of violations of fundamental rights.[7]

Inasmuch as fundamental rights may not be submitted to a vote and do not depend on the outcome of any elections,[8] such rights cannot be limited or denied simply because the majority of the people choose that it be.[9] Interference with constitutional rights may not, therefore, be justified on the grounds that the community is hostile to their exercise, and vigorously displays its feelings,[10] or simply because others do not exercise such rights.[11] Additionally, standing alone, historical patterns do not justify contemporary violations of constitutional guaranties.[12]

The denial or violation of a constitutional right is not justified by what the invasion reveals[13] or because the degree of such invasion is minor.[14] It is also not justified by showing that, in all probability, the results would have been the same had proper procedures been followed.[15] While there is a basic difference between a direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy,[16] an attempted justification of a burden on the exercise of a fundamental right, as a rational means for the accomplishment of some significant state policy, requires more than an unsupported assertion that the burden is connected to such a policy.[17]

Footnotes

1 U.S.—Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).

2 U.S.—Hosier v. Evans, 8 V.I. 27, 314 F. Supp. 316 (D.V.I. 1970).

3 Kan.—State v. Stanphill, 206 Kan. 612, 481 P.2d 998 (1971).

4 N.J.—State v. One 1990 Honda Accord, New Jersey Registration No. HRB20D, VIN No. 1HGCB7659LA063293 and Four Hundred and Twenty Dollars, 154 N.J. 373, 712 A.2d 1148 (1998).
Administrative convenience
U.S.—O'Clair v. U. S., 470 F.2d 1199 (1st Cir. 1972).
Judicial economy or convenience
U.S.—Com. v. White, 228 Pa. Super. 23, 324 A.2d 469 (1974).
Governmental convenience and certainty cannot prevail over rights
Ariz.—Mountain States Tel. & Tel. Co. v. Arizona Corp. Com'n, 160 Ariz. 350, 773 P.2d 455 (1989).

5 Cal.—Doyle v. State Bar, 32 Cal. 3d 12, 184 Cal. Rptr. 720, 648 P.2d 942 (1982).

6 Ohio—Armstrong v. Duffy, 90 Ohio App. 233, 47 Ohio Op. 233, 61 Ohio L. Abs. 187, 103 N.E.2d 760 (7th Dist. Columbiana County 1951).

7 U.S.—Great Lakes Screw Corp. v. N.L.R.B., 409 F.2d 375 (7th Cir. 1969).

8 U.S.—Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).
As to the definition and nature of fundamental rights, generally, see § 723.

9 Colo.—Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

10 U.S.—Langford v. City of Texarkana, Ark., 478 F.2d 262 (8th Cir. 1973).

11 U.S.—U.S. v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980).

12 U.S.—Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

13 Mich.—People v. Allen, 15 Mich. App. 387, 166 N.W.2d 664 (1968).

14 U.S.—Citizens Concerned for Separation of Church and State v. City and County of Denver, 481 F. Supp. 522 (D. Colo. 1979).
Relative insignificance of crime or penalty
Haw.—State v. Shigematsu, 52 Haw. 604, 483 P.2d 997 (1971).

15 Fla.—Tollett v. State, 272 So. 2d 490 (Fla. 1973).

16 U.S.—Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977).

17 U.S.—Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).

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b. Constitutional Guaranties

(3) Limitations and Restrictions on Guaranties

§ 733. Extent of limitation or restriction

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1050

While a constitutionally protected activity may, in some respects, be subjected to sanctions, it is not open to all forms of regulation.

While a constitutionally protected activity may, in some respects, be subjected to sanctions, it is not open to all forms of regulation.[1] In attaining a permissible end, the Federal Constitution requires that the powers of government be exercised so as not to unduly infringe a constitutionally protected freedom.[2]

The degree to which a citizen may be required to relinquish constitutional rights must be commensurate with the extent and nature of the threatened harm relied upon to justify the infringement.[3] In determining whether a constitutional right has been burdened impermissibly, it is, therefore, appropriate to consider the legitimacy of the challenged governmental practice.[4] Even, however, when a state or municipality is pursuing a legitimate interest, it may not choose means that unnecessarily burden or

restrict a constitutionally protected activity.[5] Accordingly, restrictions on constitutional rights are permissible if reasonable[6] and designed to accomplish a purpose properly within the purview of the state's police power.[7] Regulations that may burden or infringe individual rights and freedoms must, therefore, be tailored so that they meet the specific need without unnecessarily infringing individual freedoms.[8]

A violation of constitutional magnitude may be established even though there has not been a complete abridgment or deprivation of a constitutional right by the State.[9] A temporary deprivation of constitutional rights does not, however, require the protection that a permanent deprivation would.[10]

On fundamental rights.

A regulation which restricts the exercise of a fundamental right may be justified only by a compelling state interest,[11] and even a substantial restraint or significant interference is sufficient if for this purpose.[12] However, the means used to achieve that purpose must be no broader, nor more limiting, of personal liberties than is necessary to attain the goal sought.[13] Thus, when a state interferes with an individual's constitutional rights, it must do so in a manner which is least burdensome or oppressive to the individual.[14] If, therefore, there are other, reasonable ways to achieve a compelling state purpose with a lesser burden on constitutionally protected activity, the State may not choose the way of greater interference and, if it acts at all, must choose the less drastic means.[15] In other words, the State's approach is constitutional only if it is narrowly tailored to advance a compelling government interest,[16] as judged with reference to the law's actual purposes rather than hypothetical justifications.[17] In requiring the State to use means designed to impinge minimally upon fundamental rights, the constitution does not, however, require that the State choose ineffectual means.[18] In applying a balancing test to analyze an alleged infringement of fundamental rights, the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right.[19]

CUMULATIVE SUPPLEMENT

Cases:

Statutory requirements that were once considered constitutionally permissible may later be found to interfere significantly with a fundamental right as societal conditions and technology change. Goldstein v. Secretary of Commonwealth, 484 Mass. 516, 142 N.E.3d 560 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

2 U.S.—Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

3 Haw.—Nakamoto v. Fasi, 64 Haw. 17, 635 P.2d 946 (1981).

4 U.S.—Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

5 U.S.—Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).
Ill.—People v. Woodward, 77 Ill. App. 3d 352, 32 Ill. Dec. 822, 395 N.E.2d 1203 (2d Dist. 1979).

6 Pa.—Com. v. Morris, 565 Pa. 1, 771 A.2d 721 (2001).
For greater good of all people
N.Y.—Kraemer v. Office of Employee Relations, 63 Misc. 2d 708, 313 N.Y.S.2d 302 (Sup 1970).

7 La.—Nomey v. State, Through Edwards, 315 So. 2d 709 (La. 1975).
As to limitations and restrictions on constitutional rights pursuant to a state's police power, generally, see §§ 711 to 720.

8 U.S.—Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977).

9 Conn.—State v. Jenkins, 271 Conn. 165, 856 A.2d 383 (2004).

10 Wyo.—In re RM, 2004 WY 162, 102 P.3d 868, 194 Ed. Law Rep. 426 (Wyo. 2004).

11 Wash.—Westerman v. Cary, 125 Wash. 2d 277, 892 P.2d 1067 (1994).
W. Va.—Whitener v. W. Va. Bd. of Embalmers and Funeral Directors, 169 W. Va. 513, 288 S.E.2d 543 (1982).
As to the definition and nature of fundamental rights, generally, see § 723.
Test
Fla.—State v. J.P., 907 So. 2d 1101 (Fla. 2004).

12 U.S.—Ferency v. Austin, 493 F. Supp. 683 (W.D. Mich. 1980), decision aff'd, 666 F.2d 1023 (6th Cir. 1981).
As to the proper extent of limitations and restrictions on constitutional guarantees, generally, see § 733.
Direct prohibition or indirect inhibition or deterrence
U.S.—Valley Family Planning v. State of N.D., 489 F. Supp. 238 (D.N.D. 1980), judgment aff'd, 661 F.2d 99 (8th Cir. 1981).

13 Cal.—In re David B., 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (5th Dist. 1979).

14 U.S.—Salisbury v. List, 501 F. Supp. 105 (D. Nev. 1980).
Least restrictive manner possible
Colo.—Evans v. Romer, 882 P.2d 1335, 95 Ed. Law Rep. 392 (Colo. 1994), judgment aff'd, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 109 Ed. Law Rep. 539 (1996).

15 U.S.—Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).

16 Del.—Doe v. Wilmington Housing Authority, 88 A.3d 654 (Del. 2014).
Fla.—Jackson v. State, 137 So. 3d 470 (Fla. 4th DCA 2014), review granted, 147 So. 3d 523 (Fla. 2014).
La.—State v. Wiggins, 139 So. 3d 1 (La. Ct. App. 1st Cir. 2014).
Mont.—State v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344 (2014).
Neb.—Douglas County v. Anaya, 269 Neb. 552, 694 N.W.2d 601 (2005).
N.Y.—New York State United Teachers ex rel. Iannuzzi v. State, 46 Misc. 3d 250, 993 N.Y.S.2d 475, 309 Ed. Law Rep. 1139 (Sup 2014).
Pa.—Banfield v. Cortes, 110 A.3d 155 (Pa. 2015).

17 U.S.—Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), cert. denied, 135 S. Ct. 286, 190 L. Ed. 2d 140 (2014) and cert. denied, 135 S. Ct. 308, 190 L. Ed. 2d 140 (2014) and cert. denied, 135 S. Ct. 314, 190 L. Ed. 2d 140 (2014).

18 U.S.—Rosario v. Rockefeller, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973); Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), judgment aff'd, 430 U.S. 924, 97 S. Ct. 1541, 51 L. Ed. 2d 769 (1977).

19 N.J.—George Harms Const. Co., Inc. v. New Jersey Turnpike Authority, 137 N.J. 8, 644 A.2d 76 (1994).

End of Document

16A C.J.S. Constitutional Law § 734

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

1. General Principles

b. Constitutional Guaranties

(3) Limitations and Restrictions on Guaranties

§ 734. Prohibition against discouraging exercise of constitutional rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1059, 1060

The "unconstitutional conditions doctrine" vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

The "unconstitutional conditions doctrine" vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.[1] The right to continue the exercise of a right, benefit, or privilege generally cannot be made to depend upon submission to a condition which is hostile to constitutional provisions.[2] The government cannot, by means of a threat of penalty or a promise of reward, punish a person for exercising his or her constitutional protections or pressure him or her into waiving them.[3] A statute cannot, therefore, be used to punish a constitutionally protected activity.[4] Accordingly, a law which does not have any purpose other than to chill the assertion of constitutional rights by penalizing those who choose to exercise them is patently unconstitutional.[5] It is immaterial whether the source of such coercion is executive, legislative, or judicial in nature.[6]

Conditioning benefits.

A state cannot demand the nonassertion of constitutional rights in exchange for government benefits,[7] or withdraw a benefit, as a penalty to the recipient's exercise of a constitutional right, even if the benefit itself is not of constitutional dimension.[8] Regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.[9] In order to condition a grant of a discretionary benefit on the release of a constitutional right, the government must have an interest which outweighs the particular right at issue.[10]

CUMULATIVE SUPPLEMENT

Cases:

Under the "unconstitutional conditions doctrine," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the right. McElwain v. Office of Illinois Secretary of State, 2015 IL 117170, 396 Ill. Dec. 1, 39 N.E.3d 550 (Ill. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

2 U.S.—U.S. v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 51 S. Ct. 159, 75 L. Ed. 359 (1931).
Haw.—Nakamoto v. Fasi, 64 Haw. 17, 635 P.2d 946 (1981).

3 U.S.—U. S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).
Exaction of price
U.S.—Garrity v. State of N.J., 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

4 Ill.—People v. Brandstetter, 103 Ill. App. 3d 259, 58 Ill. Dec. 699, 430 N.E.2d 731 (4th Dist. 1982).

5 U.S.—Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (overruled in part on other grounds by, Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).
Vt.—Place v. Place, 129 Vt. 326, 278 A.2d 710 (1971).
Imposition of penalty on exercise of right impermissible burden
Colo.—Apodaca v. People, 712 P.2d 467 (Colo. 1985).

6 Cal.—People v. Collins, 26 Cal. 4th 297, 109 Cal. Rptr. 2d 836, 27 P.3d 726 (2001).

7 U.S.—McKenna v. Peekskill Housing Authority, 497 F. Supp. 1217 (S.D. N.Y. 1980), decision aff'd in part, rev'd in part on other grounds, 647 F.2d 332 (2d Cir. 1981).

8 U.S.—Park Hills Music Club, Inc. v. Board of Ed. of City of Fairborn, Greene County, State of Ohio, 512 F. Supp. 1040 (S.D. Ohio 1981).

9 U.S.—Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

10 Colo.—Lorenz v. State, 928 P.2d 1274 (Colo. 1996).
Factors considered
Kan.—State v. Mueller, 271 Kan. 897, 27 P.3d 884 (2001).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

a. In General

§ 735. First Amendment guaranties, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150

First Amendment rights are preferred rights which must be respected, and their exercise must not be substantially impaired but, rather, actively encouraged.

The First Amendment[1] is a great charter of American freedom, and the precious rights of personal liberty it protects are undoubtedly comprehended in the concept of civil rights.[2] The purpose of the First Amendment, as variously stated, is to guarantee all facets of each right described,[3] to protect minority views,[4] and to promote honesty of government by seeing to it that public business functions under the hard light of full public scrutiny.[5]

First Amendment rights are fundamental rights,[6] occupy a preferred place in American society,[7] and cannot be denied any citizen.[8] Such rights, central to any well-ordered concept of liberty,[9] must be respected and protected,[10] and their exercise must not be substantially impaired but, rather, actively encouraged.[11] Thus, the government may not penalize an individual for

robustly exercising his or her First Amendment rights.[12] Moreover, such rights are afforded particular protection beyond that afforded other constitutional rights[13] and are protected not only against heavy-handed frontal attack but also from being stifled by more subtle governmental interference.[14]

The First Amendment is made applicable to states by virtue of the Fourteenth Amendment[15] and, more particularly, by the due process clause of such amendment.[16] A cause of action exists directly under the Federal Constitution for a violation of First Amendment rights[17] and the absence or presence of a property interest does not affect a First Amendment claim.[18]

First Amendment rights and liberties must be interpreted liberally[19] in the light of current values and conditions.[20] None of the great liberties insured by the First Amendment can be given a higher place than the others.[21]

CUMULATIVE SUPPLEMENT

Cases:

The very purpose of the First Amendment was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Amend. I.

2 U.S.—City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966).

3 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).
As to the freedom of religion guaranteed by the First Amendment, generally, see §§ 855 to 917.
As to the freedom of speech and of the press guaranteed by the First Amendment, generally, see §§ 918 to 1133.
As to the freedom of assembly and petition guaranteed by the First Amendment, generally, see §§ 1134 to 1145 et seq.

4 Cal.—Eisen v. Regents of University of California, 269 Cal. App. 2d 696, 75 Cal. Rptr. 45, 37 A.L.R.3d 1300 (1st Dist. 1969).

5 U.S.—Tennessean Newspapers, Inc. v. Federal Housing Administration, 464 F.2d 657 (6th Cir. 1972).

6 U.S.—Firestone v. Let's Help Florida, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982); Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), decision aff'd, 621 F.2d 195 (5th Cir. 1980), judgment aff'd, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).
As to the definition and nature of fundamental rights, generally, see § 723.

7 U.S.—Firestone v. Let's Help Florida, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

8 U.S.—Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967).
As to whom First Amendment rights apply, generally, see §§ 728, 729.

9 U.S.—Faulkner v. Clifford, 289 F. Supp. 895 (E.D. N.Y. 1968).

10 U.S.—Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).
Affirmative duty of state to protect First Amendment rights
U.S.—Selfridge v. Carey, 522 F. Supp. 693 (N.D. N.Y. 1981).

11 U.S.—Landry v. Daley, 288 F. Supp. 200 (N.D. Ill. 1968).

As to limitations or restrictions on the exercise of First Amendment rights, generally, see §§ 739 to 743.

12 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

13 U.S.—Polk v. Ellington, 309 F. Supp. 1349 (W.D. Tenn. 1970).

14 U.S.—P. A. M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975).

Illicit legislative intent not required

Vt.—Vermont Soc. of Ass'n Executives v. Milne, 172 Vt. 375, 779 A.2d 20 (2001).

15 U.S. Const. Amend. XIV.

16 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

17 U.S.—Dellums v. Powell, 566 F.2d 167, 24 Fed. R. Serv. 2d 20 (D.C. Cir. 1977).

18 U.S.—Wells v. Hico Independent School Dist., 736 F.2d 243, 18 Ed. Law Rep. 225 (5th Cir. 1984).

19 N.Y.—Figari v. New York Tel. Co., 32 A.D.2d 434, 303 N.Y.S.2d 245 (2d Dep't 1969).

20 U.S.—U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982).

21 U.S.—Robinson v. Price, 615 F.2d 1097 (5th Cir. 1980).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

a. In General

§ 736. Scope of First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150

The First Amendment is not equivocal but is, rather, broad and explicit in its scope.

The First Amendment is not equivocal but is, rather, broad and explicit in its scope.[1] It is broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.[2] It applies to both legislative and judicial power.[3]

The First Amendment takes precedence over a state constitution[4] and includes self-imposed restraints upon the majority.[5] The First Amendment rights or guaranties are not, however, absolute,[6] unlimited,[7] or immune from control.[8] Such rights must be applied and adjudicated in the light of the special characteristics of the environment in the particular action.[9] They must also be exercised responsibly and without depriving others of their rights[10] and cannot be used as a means or pretext for achieving substantive evils which the legislature has the power to control.[11]

The First Amendment is related to, and safeguards, conscience and human dignity[12] and protects the freedom to believe[13] and freedom to act.[14] The freedom to believe is absolute while the freedom to act is subject to regulation for the protection of society.[15] At the heart of the First Amendment is the notion that an individual must be free to believe as he or she will and that, in a free society, a person's belief must be shaped by his or her mind and his or her conscience rather than coerced by the state.[16] In this aspect, freedom of belief is not an incidental or secondary aspect of the First Amendment protection.[17]

The freedoms guaranteed by the First Amendment of the Federal Constitution with respect to religion, speech, press, and the right to assemble and petition[18] include the freedom to differ in various matters of opinion, such as politics, nationalism, or religion.[19] No official high or low can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.[20] The freedom to differ is not limited to things that do not matter much, but the test of substance is the right to differ as to things which touch the heart of the existing order.[21]

CUMULATIVE SUPPLEMENT

Cases:

If there is any fixed star in the constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein, and compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command. U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Melton v. Young, 328 F. Supp. 88 (E.D. Tenn. 1971), judgment aff'd, 465 F.2d 1332 (6th Cir. 1972).

2 U.S.—Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

3 Minn.—Odenthal v. Minnesota Conference of Seventh-Day Adventists, 649 N.W.2d 426 (Minn. 2002).

4 N.Y.—La Rocca v. Lane, 47 A.D.2d 243, 366 N.Y.S.2d 456 (2d Dep't 1975), order aff'd, 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606, 84 A.L.R.3d 1131 (1975).

5 N.H.—Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (1967).

6 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).
Colo.—Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004).
Rights must be weighed against other societal interests
Ind.—Journal-Gazette Co., Inc. v. Bandido's, Inc., 712 N.E.2d 446 (Ind. 1999).
Accommodation of public policy
U.S.—Patterson v. Warner, 371 F. Supp. 1362 (S.D. W. Va. 1972).

7 U.S.—Elk Grove Firefighters Local No. 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975), aff'd, 539 F.2d 714 (7th Cir. 1976).
Limitations not forbidden
U.S.—U.S. v. Farinas, 308 F. Supp. 459 (S.D. N.Y. 1969), order aff'd, 448 F.2d 1334 (2d Cir. 1971).

8 Ill.—Paschen Contractors, Inc. v. Burrell, 14 Ill. App. 3d 748, 303 N.E.2d 246 (1st Dist. 1973).
Not impenetrable shield

Kan.—State v. Whitesell, 270 Kan. 259, 13 P.3d 887 (2000).

Not umbrella shielding verbal charlatan from responsibility for conduct

Neb.—State, Dept. of Health v. Hinze, 232 Neb. 550, 441 N.W.2d 593 (1989).

9 U.S.—Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (overruled on other grounds by, Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)); Connecticut State Federation of Teachers v. Board of Ed. Members, 538 F.2d 471 (2d Cir. 1976).

10 U.S.—Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

11 U.S.—California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

12 U.S.—Stanford v. State of Tex., 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

13 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

Colo.—Sanger v. Dennis, 148 P.3d 404 (Colo. App. 2006).

14 U.S.—N.L.R.B. v. World Evangelism, Inc., 656 F.2d 1349 (9th Cir. 1981).

15 U.S.—N.L.R.B. v. World Evangelism, Inc., 656 F.2d 1349 (9th Cir. 1981).

16 U.S.—Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

17 U.S.—Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

18 Ala.—Opinion of the Justices, 252 Ala. 351, 40 So. 2d 849 (1949).

As to the freedom of religion guaranteed by the First Amendment, generally, see §§ 855 to 917.

As to the freedom of speech and of the press guaranteed by the First Amendment, generally, see §§ 918 to 1133.

As to the freedom of assembly and petition guaranteed by the First Amendment, generally, see §§ 1134 to 1145 et seq.

19 U.S.—West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).

20 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

21 U.S.—Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943); Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

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IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

b. Function of Court

§ 737. Function of courts in First Amendment cases, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150

A court must defer to the First Amendment and has an obligation to protect the rights guaranteed by the First Amendment.

A court must defer to the First Amendment[1] and has an obligation to protect the rights guaranteed by such amendment.[2] The courts must intercede when the fear of injury, that is neither imaginary nor speculative, discourages the exercise of First Amendment rights.[3] A court must seek to apply flexible First Amendment doctrines in a manner which is both sensible and realistic.[4]

Where First Amendment interests are raised, they must be vindicated prior to the disposition of other claims.[5] The fear that an exercise of a First Amendment right may have undesirable consequences cannot inhibit judicial vindication of such right.[6]

In reviewing First Amendment claims, the court must consider whether a statute is unconstitutional on its face, not only in the factual context but also in its broader implications.[7] Facial invalidation is, however, inappropriate, even if there are marginal applications in which a statute would infringe on First Amendment values, if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.[8]

Need to differentiate between types of challenges made.

When analyzing challenges to a regulation's constitutionality based on the First Amendment, courts must differentiate between an as-applied challenge and an overbreadth challenge.[9] An as-applied challenge asserts that the particular acts which gave rise to the litigation fall outside what a properly drawn regulation can cover.[10] An overbreadth challenge, on the other hand, attacks a regulation's facial validity, enabling persons to whom a statute may constitutionally be applied to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.[11] The distinction between facial and as-applied First Amendment challenges goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint.[12]

Footnotes

1 U.S.—Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

2 N.J.—Keuper v. Wilson, 111 N.J. Super. 502, 268 A.2d 760 (Ch. Div. 1970).
First Amendment rights subject of special protection by courts
U.S.—Stern v. U.S. Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977).
Court must be unswerving in its protection of First Amendment values
U.S.—Bertot v. School Dist. No. 1, Albany County, Wyo., 613 F.2d 245 (10th Cir. 1979).

3 U.S.—Federal Election Com'n v. Hall-Tyner Election Campaign Committee, 678 F.2d 416 (2d Cir. 1982).

4 Wash.—State v. Meacham, 93 Wash. 2d 735, 612 P.2d 795 (1980).
As to differing levels of scrutiny, see § 743.

5 Md.—Bancroft Information Group, Inc. v. Comptroller of Treasury, 91 Md. App. 100, 603 A.2d 1289 (1992).

6 N.J.—Application of Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976).

7 U.S.—Parker v. Morgan, 322 F. Supp. 585 (W.D. N.C. 1971).

8 U.S.—Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

9 Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

10 Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

11 Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).
As to overbreadth challenges to the constitutionality of a statute based upon the First Amendment, generally, see §§ 748 to 753.

12 U.S.—Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

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A. In General

2. First Amendment Guaranties

b. Function of Court

§ 738. Balancing of interests

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1156

When First Amendment rights are sought to be regulated, or when an abridgment of such freedoms is charged, the court must closely scrutinize the statute or governmental action involved and must balance the importance of the activity, and the degree and type of restraint, against the governmental interest involved.

When First Amendment freedoms are sought to be regulated or when an abridgment of such freedoms is charged, the court must carefully weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.[1] In this connection, where First Amendment rights are involved, the court is obliged to make an independent and careful examination of the record[2] and must closely scrutinize a statute or governmental action that seeks to prohibit or penalize the free exercise of such rights.[3] In determining whether statutes protecting legitimate community interests infringe First Amendment rights, the court must be mindful to keep the freedoms of the First Amendment in a preferred position.[4]

Inasmuch as First Amendment rights are not absolute,[5] the courts must balance them against a compelling public interest.[6] More specifically, the court must balance the importance of the activity and the degree and the type of restraint against the governmental interest in having the particular restraining law that infringes First Amendment rights.[7] The test to be employed is to determine first, whether the asserted state interest is compelling or paramount, and second, whether the state action has a requisite nexus with the state's asserted goal.[8]

In balancing competing interests, the courts have developed different levels of scrutiny applicable to different types of situations.[9]

CUMULATIVE SUPPLEMENT

Cases:

Although the First Amendment's protections extend beyond written or spoken words as mediums of expression, all speech is not treated equally; while pure speech activities are rigorously protected regardless of meaning, symbolic speech or conduct must be sufficiently imbued with elements of communication, and is subject to a relaxed constitutional standard. U.S.C.A. Const.Amend. 1. Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 N.J.—Schaad v. Ocean Grove Camp Meeting Ass'n of United Methodist Church, 72 N.J. 237, 370 A.2d 449 (1977) (overruled on other grounds by, State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979)).

2 U.S.—Thomas v. Board of Ed., Granville Central School Dist., 607 F.2d 1043 (2d Cir. 1979).

3 Colo.—People v. Denver Pub. Co., Inc., 198 Colo. 213, 597 P.2d 1038 (1979).

4 U.S.—Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980).

5 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).
As to the limitations and restrictions on First Amendment rights, generally, see §§ 739 to 743.

6 U.S.—New Rider v. Board of Ed. of Independent School Dist. No. 1, Pawnee County, Oklahoma, 480 F.2d 693 (10th Cir. 1973).
Balance of individual rights against requirements of society
Ky.—State Bd. for Elementary and Secondary Educ. v. Howard, 834 S.W.2d 657, 76 Ed. Law Rep. 1211 (Ky. 1992).

7 U.S.—Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973).

8 U.S.—Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973).
As to the necessity and determination of state action where a statute or regulation is challenged on First Amendment grounds, generally, see §§ 741, 742.

9 § 743.

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A. In General

2. First Amendment Guaranties

c. Limitations and Restrictions

§ 739. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1155

Any statute, regulation, or official act that unnecessarily chills or impinges on the exercise of First Amendment rights is unconstitutional.

As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[1] Any statute, regulation, or official act that unnecessarily chills or impinges on the exercise of First Amendment rights is unconstitutional.[2] The regulation of First Amendment rights as to time, place, and manner of exercise is, however, proper when reasonably related to a valid public interest.[3] While a state may restrain and regulate the exercise of a person's First Amendment rights pursuant to its police power,[4] the several states have no greater power to restrain individual freedoms protected by the First Amendment than does the Congress of the United States.[5]

What constitutes chilling of First Amendment rights, generally.

The determination of whether government conduct or speech has a chilling effect or an adverse impact on constitutionally protected activity is an objective one; courts determine whether a similarly situated person of ordinary firmness reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case.[6] Mere rudeness or inconvenience, however unpleasant, does not rise to the level of a cognizable "chill" on the exercise of First Amendment rights.[7]

Conditioning exercise of right.

A discrimination that impairs fundamental rights protected by the First Amendment by placing a condition, even on a benefit or a privilege, generally infringes the Federal Constitution.[8] Thus, conditions on public benefits which dampen the exercise of First Amendment rights, however slight the inducement to the individual to forsake those rights, are generally prohibited.[9]

Preconditions to the exercise of First Amendment rights, when reasonable in nature, do not always constitute an abridgment of that right.[10] Accordingly, a governmental authority is not strictly forbidden from imposing some financial burden incidental to the exercise of First Amendment rights.[11] Thus, while, generally, fees may not be charged for the privilege of exercising First Amendment rights, fees may be imposed on activities protected by the First Amendment if the fees are necessary to achieve the underlying, governmental interest and used to defray the cost of policing such activity.[12] A statute is, however, presumptively inconsistent with the First Amendment if it imposes a financial burden because of content.[13] Moreover, a requirement that organizations receiving funding under a federal statute have a policy expressing a particular point of view violates the First Amendment.[14]

Subsidization of First Amendment rights.

First Amendment rights are not abridged merely because the federal government refuses to subsidize such rights and the Federal Constitution does not require Congress to subsidize First Amendment activity.[15] Any discrimination in government subsidization of First Amendment rights must, however, be narrowly tailored to meet a substantial state purpose.[16]

Footnotes

1 U.S.—281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 2015 WL 1280248 (U.S. 2015).

2 N.Y.—People v. Duryea, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (Sup 1974), order aff'd, 44 A.D.2d 663, 354 N.Y.S.2d 129 (1st Dep't 1974).

Chilling of First Amendment rights in connection with vagueness and overbreadth challenges, see §§ 744 to 753.

Public policy to protect rights against possible chilling influences

U.S.—Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972).

Presumption

Legislation allowing prior restraints of First Amendment rights comes into court bearing a heavy presumption against its validity.

N.J.—Hurwitz v. Boyle, 117 N.J. Super. 196, 284 A.2d 190 (App. Div. 1971).

3 U.S.—International Soc. for Krishna Consciousness, Inc. v. McAvey, 450 F. Supp. 1265 (S.D. N.Y. 1978).

As to when First Amendment rights may be properly restricted, generally, see § 740.

4 **Regulation of formation of private armies**

U.S.—Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 34 Fed. R. Serv. 2d 875 (S.D. Tex. 1982).

5 U.S.—Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29, 25 Ed. Law Rep. 39 (1985).

Wash.—Washington State Republican Party v. Washington State Public Disclosure Com'n, 141 Wash. 2d 245, 4 P.3d 808 (2000).

6 U.S.—The Baltimore Sun Co. v. Ehrlich, 437 F.3d 410 (4th Cir. 2006).

7 U.S.—Cotz v. Mastroeni, 476 F. Supp. 2d 332 (S.D. N.Y. 2007).

8 U.S.—Haswell v. U. S., 205 Ct. Cl. 421, 500 F.2d 1133 (1974).

Purpose of prohibition

Kan.—State v. Mueller, 271 Kan. 897, 27 P.3d 884 (2001).

9 U.S.—Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

Exaction of fees for privilege of exercising rights impermissible

U.S.—Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981).

10 Colo.—People v. Hampton, 696 P.2d 765 (Colo. 1985).

11 N.D.—City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981).

12 Ky.—Associated Industries of Kentucky v. Com., 912 S.W.2d 947 (Ky. 1995).

Reasonable fees

Fla.—State by Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992).

Statutory fee for representation

U.S.—Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985).

13 U.S.—Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

14 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

15 U.S.—Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), judgment rev'd on other grounds, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983).

16 U.S.—Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), judgment rev'd on other grounds, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983).

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2. First Amendment Guaranties

c. Limitations and Restrictions

§ 740. When properly restricted

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150

Restraints on First Amendment rights are permitted for appropriate reasons.

Restraints on First Amendment rights are permitted for appropriate reasons.[1] The exercise of First Amendment rights may properly be restricted when the unbridled exercise of the right may invade and injure the rights of others[2] or where the rights are used as an integral part of conduct which violates a valid statute.[3] Lawful restrictions may, therefore, be imposed upon the free exercise of First Amendment rights where the exercise of such rights is sought by unauthorized entry onto private property.[4]

Invasion of First Amendment rights cannot be predicated on speculative concern of danger[5] or on fear and apprehension of illegal conduct.[6] A finding of unprotected present conduct cannot serve as a basis for prohibition of future conduct that may fall within the purview of the First Amendment.[7] The protections of the First Amendment do not depend upon the notoriety

of an issue[8] and are not limited to issues of great social and political impact.[9] It is also immaterial whether an activity which enjoys First Amendment protection is carried on for profit.[10]

The scope of governmental regulation of protected First Amendment activity designed to serve a substantial governmental interest must be no greater than is essential to the furtherance of that interest.[11] Thus, the means employed by a statute threatening First Amendment rights to achieve a permissible state interest must be necessary to achieve the ends sought.[12] A mere rational, reasonable, or even substantial relationship will not suffice.[13]

What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.[14] Additionally, the neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.[15]

CUMULATIVE SUPPLEMENT

Cases:

Even if an image is not protected as pure speech, it may nonetheless fall within the First Amendment's purview as symbolic speech. U.S.C.A. Const.Amend. 1. Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); Cerjan v. Fasula, 539 F. Supp. 1226 (N.D. Ohio 1981), aff'd, 703 F.2d 559 (6th Cir. 1982).
Factors considered in assessing permissibility of restraint
Or.—Cooper v. Oregon School Activities Ass'n, 52 Or. App. 425, 629 P.2d 386, 15 A.L.R.4th 869 (1981).

2 Wash.—State v. Gossett, 11 Wash. App. 864, 527 P.2d 91 (Div. 1 1974).
Danger to life and property
U.S.—A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975).

3 U.S.—California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

4 N.Y.—Anderson v. WROC-TV, 109 Misc. 2d 904, 441 N.Y.S.2d 220 (Sup 1981).

5 U.S.—Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974).
Threat of violence or public hostility
U.S.—Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966).

6 U.S.—Ad World, Inc. v. Doylestown Tp., 672 F.2d 1136 (3d Cir. 1982).
Prospect of crime insufficient to justify suppression of protected speech
U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

7 N.Y.—Colonie Theater v. City of Schenectady, 89 A.D.2d 631, 453 N.Y.S.2d 94 (3d Dep't 1982).

8 U.S.—Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977).

9 U.S.—Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974).

10 Cal.—Morris v. Municipal Court, 32 Cal. 3d 553, 186 Cal. Rptr. 494, 652 P.2d 51 (1982).

11 W. Va.—West Virginia Citizens Action Group, Inc. v. Daley, 174 W. Va. 299, 324 S.E.2d 713 (1984).

12 Wash.—City of Bellevue v. Lorang, 140 Wash. 2d 19, 992 P.2d 496 (2000).

13 Wash.—City of Bellevue v. Lorang, 140 Wash. 2d 19, 992 P.2d 496 (2000).

14 U.S.—Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

15 U.S.—Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

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A. In General

2. First Amendment Guaranties

c. Limitations and Restrictions

§ 741. State action as prerequisite to constitutional violation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1151

The First Amendment guaranties restrain only action undertaken by a government, federal or state, and do not circumscribe action by private individuals and entities.

The fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.[1] Accordingly, the First Amendment guaranties are limitations on action by a government, federal or state only, and do not circumscribe action by private individuals and entities.[2] More specifically, the Federal Constitution does not prohibit a private person's infringement of another person's First Amendment rights but forbids only such infringement which may properly be attributable to the state.[3] Without state action, therefore, there can be no valid claim of unconstitutionality.[4] The First Amendment does not protect citizens from conduct by private actors, no matter how egregious that conduct might be.[5] Thus, so long as private action does not constitute state action, it is not subject to constitutional oversight.[6] Claims under First Amendment may only be brought against state actors.[7]

On the other hand, the First Amendment does apply to private parties when those parties are engaged in activity deemed to be "state action."[8] That is, when private action becomes imbued with a governmental character,[9] or when the government significantly insinuates itself into the operative activities of private parties, action by private parties may be subject to all of the constitutional limitations on governmental action.[10]

Footnotes

1 Wash.—Southcenter Joint Venture v. National Democratic Policy Committee, 113 Wash. 2d 413, 780 P.2d 1282 (1989).

2 U.S.—Central Hardware Co. v. N.L.R.B., 407 U.S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972); Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982).

Not a restraint on conduct of private individuals

Tenn.—Stein v. Davidson Hotel Co., 945 S.W.2d 714 (Tenn. 1997).

3 Wash.—Stephanus v. Anderson, 26 Wash. App. 326, 613 P.2d 533 (Div. 1 1980).

Testator, or settlor of trust not a state actor

Ill.—In re Estate of Feinberg, 235 Ill. 2d 256, 335 Ill. Dec. 863, 919 N.E.2d 888 (2009).

Health maintenance organizations not government actors

U.S.—Gonzalez-Maldonado v. MMM Healthcare, Inc., 693 F.3d 244 (1st Cir. 2012).

4 Miss.—Mississippi High School Activities Ass'n, Inc. v. Coleman By and on Behalf of Laymon, 631 So. 2d 768, 89 Ed. Law Rep. 692 (Miss. 1994).

As to the determination of whether an action is a state action, generally, see § 742.

5 U.S.—Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7, 570 F.3d 811 (7th Cir. 2009).

6 Conn.—State v. Martin, 35 Conn. Supp. 555, 398 A.2d 1197 (Super. Ct. Appellate Sess. 1978).

7 U.S.—Williams v. Savage, 569 F. Supp. 2d 99, 71 Fed. R. Serv. 3d 411 (D.D.C. 2008).

8 U.S.—Cooper v. U.S. Postal Service, 577 F.3d 479 (2d Cir. 2009).

9 **Conduct fairly attributable to government**

Tex.—Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997).

10 U.S.—Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974).

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2. First Amendment Guaranties

c. Limitations and Restrictions

§ 742. State action as prerequisite to constitutional violation—Determination of state action

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1151

With regard to challenges based upon the First Amendment, in order to convert an otherwise private action into state action, the State must affirmatively support, and be directly involved in, the challenged acts, or the private entity or person must be performing a function that is traditionally exclusively a government function.

With regard to challenges based upon the First Amendment, in order to convert an otherwise private action into state action, the State must affirmatively support, and be directly involved in, the challenged acts,[1] or the private entity must be performing a function that is traditionally exclusively a government function.[2] To determine if an entity is a state actor subject to constitutional duties or restrictions, the nature and extent of state involvement must be evaluated so as to determine if its actions are fairly attributable to the state.[3] The relevant question in determining whether state officials charged with violating an individual's constitutional rights are state actors is whether the actions complained of are committed while the officials are purporting to act under the authority vested in them by the State or are otherwise made possible because of the privileges of employment.[4]

Active state involvement in the affairs of a private organization may invoke constitutional protection while passive involvement does not.[5] State involvement with a project must be significant, concerned with the activity which caused an alleged constitutional injury, and must aid, encourage, or connote approval of the activity.[6] Thus, when the government has commanded or compelled a particular result, it becomes involved with that result to a significant extent and the state action requirement is met,[7] and the government, whether state or federal, may not evade constitutional requirements simply by calling a government-created and controlled corporation an independent entity.[8] On the other hand, enactment of a statute permitting, but not requiring, private conduct with no further significant participation by the State is not state action.[9] The mere fact that an activity might not constitute state action for purposes of the Federal Constitution does not, perforce, however, necessitate that the same conclusion be reached when that conduct is claimed to be a violation of the state constitution.[10]

While a private entity may not be subject to First Amendment obligations by virtue of a joint relationship with, or direct regulation by, the State,[11] it may, nevertheless, be required to honor First Amendment rights if its property is sufficiently devoted to public uses.[12] The state action doctrine is not, however, applicable where a group seeks to exercise First Amendment rights in a public forum dedicated to that purpose.[13]

CUMULATIVE SUPPLEMENT

Cases:

A private entity can qualify as a state actor subject to constitutional constraints in a few limited circumstances, including, for example: (1) when the private entity performs a traditional, exclusive public function; (2) when the government compels the private entity to take a particular action; or (3) when the government acts jointly with the private entity. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Okla.—Oklahomans for Life, Inc. v. State Fair of Oklahoma, Inc., 1981 OK 101, 634 P.2d 704 (Okla. 1981).

2 U.S.—Fike v. United Methodist Children's Home of Virginia, Inc., 547 F. Supp. 286 (E.D. Va. 1982), judgment aff'd, 709 F.2d 284 (4th Cir. 1983).

3 W. Va.—State ex rel. McGraw v. Burton, 212 W. Va. 23, 569 S.E.2d 99 (2002).
Factors considered
N.H.—HippoPress, LLC v. SMG (A Pennsylvania Partnership), 150 N.H. 304, 837 A.2d 347 (2003).

4 U.S.—Givens v. O'Quinn, 447 F. Supp. 2d 593 (W.D. Va. 2006).
Me.—Holland v. Sebunya, 2000 ME 160, 759 A.2d 205 (Me. 2000).

5 Wash.—Long v. Chiropractic Soc. of Washington, 93 Wash. 2d 757, 613 P.2d 124 (1980).
Pervasive entwinement of public institutions and officials in private association
U.S.—Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 151 Ed. Law Rep. 18 (2001); Marie v. American Red Cross, 771 F.3d 344 (6th Cir. 2014).

6 U.S.—Fike v. United Methodist Children's Home of Virginia, Inc., 547 F. Supp. 286 (E.D. Va. 1982), judgment aff'd, 709 F.2d 284 (4th Cir. 1983).
No one fact can function as necessary condition for finding state action
U.S.—Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 151 Ed. Law Rep. 18 (2001).

7 Md.—McIntyre v. Guild, Inc., 105 Md. App. 332, 659 A.2d 398 (1995).

8 U.S.—Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).

9 Wash.—Long v. Chiropractic Soc. of Washington, 93 Wash. 2d 757, 613 P.2d 124 (1980).

10 N.Y.—Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

11 N.J.—State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

12 N.J.—State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

13 U.S.—National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973).

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16A C.J.S. Constitutional Law § 743

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

c. Limitations and Restrictions

§ 743. Determination of validity of restriction; level of scrutiny

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1156

There are two possible levels of scrutiny that may apply in assessing the constitutionality of a law challenged on free exercise grounds. Strict scrutiny, the more robust standard, requires that a law be justified by a compelling governmental interest and be narrowly tailored to advance that interest. Alternatively, under rational basis review, legislation is presumed to be valid and will be sustained if the burden imposed by the statute is rationally related to a legitimate state interest.

There are two possible levels of scrutiny that may apply in assessing the constitutionality of a law challenged on free exercise grounds. Strict scrutiny, the more robust standard, requires that a law be justified by a compelling governmental interest and be narrowly tailored to advance that interest.[1] Alternatively, under rational basis review, legislation is presumed to be valid and will be sustained if the burden imposed by the statute is rationally related to a legitimate state interest.[2] The level of scrutiny to be applied depends upon the content-neutrality of the statute.[3] A law that is neutral and of general applicability need not be justified by a compelling government interest.[4]

First Amendment freedoms may not be severely[5] infringed absent a compelling state interest[6] in the regulation of a subject within a state's constitutional power to regulate.[7] It is only when the exercise of such rights threatens a clear and present danger to some substantial state interest that the State is justified in curtailing them.[8] Thus, the substantive evil must be extremely serious and the degree of imminence extremely high before First Amendment freedoms can be abridged.[9]

While governmental regulation which has an incidental effect on First Amendment freedoms may be justified in certain, narrowly defined, instances,[10] when the government acts with mixed motives in enacting rules interfering with First Amendment rights, the test for determining the validity of the rule is whether the government would have chosen the same method without regard for impermissible purposes.[11] The fact that First Amendment rights are implicated does not, however, mean those rights are burdened.[12] The burden of proving a legitimate state interest,[13] and that the means employed are the least restrictive appropriate to the task,[14] rests on the state.

Narrow tailoring of restriction.

Even where a compelling governmental interest exists, any government regulation of First Amendment rights must be carefully tailored so that the rights are not needlessly impaired.[15] Thus, inasmuch, as First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity.[16] Precision must be the touchstone of legislation that implicates the fundamental freedoms underpinning the First Amendment.[17] Any restriction on such rights must, in addition to being narrow,[18] be reasonable, and the subject of equal application throughout the community.[19]

A law of general application passes muster under narrow tailoring principles as long as it is not substantially broader than necessary to accomplish the legislature's legitimate goal.[20] Where the government can further its interest by a lesser restraint on First Amendment rights and freedoms, at little or no added inconvenience, it must do so.[21] Thus, if the same goal may be achieved by two methods, and one substantially burdens First Amendment rights and the other does not, the latter must be used,[22] though an ordinance challenged on First Amendment grounds does not, necessarily, have to be the least restrictive means to remedy the asserted governmental interest.[23] The breadth of a legislative abridgment of First Amendment rights must be viewed in the light of less drastic means for achieving the same basic purpose,[24] and any restriction of First Amendment rights must, therefore, be limited to only that which is necessary to accomplish the intended purpose.[25]

CUMULATIVE SUPPLEMENT

Cases:

Under exacting scrutiny review of the constitutionality of a statute under the First Amendment, there must be a substantial relation between an important government interest and the information required to be disclosed. U.S. Const. Amend. 1. Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).
Minn.—State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).

2 U.S.—Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).

3 U.S.—Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).

4 U.S.—Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

5 U.S.—Idaho Republican Party v. Ysursa, 765 F. Supp. 2d 1266 (D. Idaho 2011); Project Vote v. Kelly, 805 F. Supp. 2d 152 (W.D. Pa. 2011).

6 U.S.—Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986); Libertarian Party of North Dakota v. Jaeger, 659 F.3d 687 (8th Cir. 2011).
Determination of compelling state interest
U.S.—Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981).

7 N.Y.—People ex rel. Arcara v. Cloud Books, Inc., 65 N.Y.2d 324, 491 N.Y.S.2d 307, 480 N.E.2d 1089 (1985), judgment rev'd on other grounds, 478 U.S. 697, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986).

8 U.S.—Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 29 Fed. R. Serv. 2d 355 (E.D. La. 1977).

9 U.S.—U.S. v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

10 U.S.—N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).
Factors justifying regulation
U.S.—U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

11 U.S.—Tacynec v. City of Philadelphia, 687 F.2d 793 (3d Cir. 1982).

12 Vt.—Kimbell v. Hooper, 164 Vt. 80, 665 A.2d 44 (1995).

13 U.S.—Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).
Degree of justification necessary
Pa.—Com. v. Wadzinski, 492 Pa. 35, 422 A.2d 124 (1980).

14 Mo.—Pollard v. Board of Police Com'rs, 665 S.W.2d 333 (Mo. 1984).

15 U.S.—United Steelworkers of America, AFL-CIO-CLC v. Sadlowski, 457 U.S. 102, 102 S. Ct. 2339, 72 L. Ed. 2d 707 (1982).
Legislation must be narrowly tailored to specific purpose
Mass.—Globe Newspaper Co. v. Commissioner of Revenue, 410 Mass. 188, 571 N.E.2d 617 (1991).
Prior restraint must be tailored to particular needs
Ky.—Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001).

16 U.S.—Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013); Hodge v. Talkin, 949 F. Supp. 2d 152 (D.D.C. 2013).
Fla.—Montgomery v. State, 69 So. 3d 1023 (Fla. 5th DCA 2011).
Ga.—State v. Fielden, 280 Ga. 444, 629 S.E.2d 252 (2006).
Tex.—King Street Patriots v. Texas Democratic Party, 2014 WL 7014378 (Tex. App. Austin 2014).

17 Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).

18 **Government may regulate only with narrow specificity**
Utah—I.M.L. v. State, 2002 UT 110, 61 P.3d 1038 (Utah 2002).
Restrictions must involve no more infringement than is necessary
Fla.—In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)), 603 So. 2d 494 (Fla. 1992).

19 U.S.—Entertainment Systems, Inc. v. Sedita, 319 F. Supp. 686 (W.D. N.Y. 1970).

20 U.S.—McCullen v. Coakley, 571 F.3d 167, 62 A.L.R.6th 739 (1st Cir. 2009).
Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

21 U.S.—National Treasury Emp. Union v. Fasser, 428 F. Supp. 295 (D.D.C. 1976).

22 Fla.—State by Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992).

23 U.S.—Free Speech Coalition, Inc. v. Holder, 957 F. Supp. 2d 564 (E.D. Pa. 2013), appeal dismissed, (3rd Circ. 13-3799) (Mar. 4, 2014).
Mich.—City of Rochester Hills v. Schultz, 459 Mich. 486, 592 N.W.2d 69 (1999).

24 N.D.—City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981).

25 N.J.—Farrell v. Teaneck Tp., 126 N.J. Super. 460, 315 A.2d 424 (Law Div. 1974).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

d. Vagueness and Overbreadth

(1) Overview

§ 744. Vagueness and overbreadth in First Amendment context, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150, 1163

A statute which is vague or overbroad is unconstitutional insofar as it operates in the area of First Amendment freedoms.

Imprecise laws operating in the area of First Amendment[1] freedoms may properly be attacked on their face pursuant to two different doctrines.[2] First, a statute may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep,[3] overbreadth challenges being permitted in the First Amendment context, not for the benefit of the litigant, but for the benefit of society, to prevent the statute from chilling the constitutionally protected rights of other parties not before the court.[4] Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.[5]

Although the overbreadth and vagueness doctrines are conceptually distinct,[6] and require independent analyses,[7] in the First Amendment context they tend to overlap since statutes are often overly broad because their language is vague as to what behavior is proscribed.[8] In the First Amendment context, vagueness and overbreadth are two sides of the same coin, and the two sorts of challenges are often conceived of as alternative and often overlapping theories for relief on the same claim.[9]

Whether analyzed from the point of view of vagueness or overbreadth, any legislative impingement on First Amendment rights must be drawn with precision and narrow specificity[10] and must be tailored to serve its legitimate objectives.[11] Accordingly, a statute that regulates First Amendment activities must have standards susceptible of objective measurement[12] or have standards that are narrow, objective, and definite to guide those who exercise the authority to restrict protected constitutional rights.[13]

Footnotes

1 U.S. Const. Amend. I.

2 U.S.—City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

3 § 753.

4 § 749.

5 U.S.—City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).
As to the void for vagueness doctrine, generally, see §§ 745 to 747.

6 Conn.—State v. DeLoreto, 265 Conn. 145, 827 A.2d 671 (2003).
Fla.—Simmons v. State, 944 So. 2d 317 (Fla. 2006).
Distinction between doctrines
Kan.—State v. Wilson, 267 Kan. 550, 987 P.2d 1060 (1999).

7 W. Va.—Sale ex rel. Sale v. Goldman, 208 W. Va. 186, 539 S.E.2d 446 (2000).

8 Minn.—Matter of Welfare of S. L. J., 263 N.W.2d 412 (Minn. 1978).

9 U.S.—Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012).

10 U.S.—U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966).
Ill.—People v. Brandstetter, 103 Ill. App. 3d 259, 58 Ill. Dec. 699, 430 N.E.2d 731 (4th Dist. 1982).
Degree of specificity required
Wash.—Stastny v. Board of Trustees of Central Washington University, 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).

11 Miss.—Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997).
As to the necessity to narrowly tailor limitations or restriction on First Amendment rights, generally, see § 743.

12 U.S.—Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980), judgment aff'd, 456 U.S. 951, 102 S. Ct. 2025, 72 L. Ed. 2d 477 (1982).

13 Wash.—Stastny v. Board of Trustees of Central Washington University, 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).
Laws must provide explicit standards for those who apply them
Mo.—State v. Helgoth, 691 S.W.2d 281 (Mo. 1985).
Stricter standards of definiteness required
U.S.—Angelico v. State of La., 593 F.2d 585 (5th Cir. 1979).
Relation to police powers
Mich.—Soof v. City of Highland Park, 30 Mich. App. 400, 186 N.W.2d 361 (1971).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

d. Vagueness and Overbreadth

(2) Vagueness

§ 745. Vague enactments in First Amendment cases, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1160

An enactment may be void for vagueness because either it (1) fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; (2) impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application; or (3) abuts upon sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of those freedoms.

The prohibition against overly vague laws protects individuals from having to voluntarily curtail First Amendment activities because of a fear those activities could be characterized as illegal activities due to an unconstitutionally vague statute.[1] An enactment may be void for vagueness because it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited;[2] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application;[3] or it abuts upon sensitive areas of basic First Amendment freedoms, thereby operating to inhibit the exercise of those freedoms.[4]

While First Amendment rights cannot be abridged, or even chilled, by statutory vagueness,[5] the degree of vagueness that the constitution will tolerate, as well as the relative importance of fair notice and fair enforcement, depends, in part, on the nature of the enactment.[6] Stricter standards of permissible statutory vagueness generally apply to a statute interfering with First Amendment rights.[7] The First Amendment vagueness doctrine, however, while stricter than the simple due process vagueness standard,[8] is similar to that standard in that it cannot be invoked by a party who is within "hard-core" prohibitions of an otherwise valid statute whose outer limits may be vague.[9]

It has been said that the standard applied by the court, on a First Amendment challenge to a regulation as impermissibly vague, is the practical criterion of fair notice to those to whom the statute is directed.[10] The standard to determine whether or not a statute is void for vagueness is not one that can be mechanically applied.[11]

Footnotes

1 N.D.—Peters-Riemers v. Riemers, 2001 ND 62, 624 N.W.2d 83 (N.D. 2001).

2 U.S.—Calop Business Systems, Inc. v. City of Los Angeles, 984 F. Supp. 2d 981 (C.D. Cal. 2013).
Nev.—Clancy v. State, 313 P.3d 226, 129 Nev. Adv. Op. No. 89 (Nev. 2013).
Ohio—In re Judicial Campaign Complaint Against Stormer, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317 (2013).

3 U.S.—Calop Business Systems, Inc. v. City of Los Angeles, 984 F. Supp. 2d 981 (C.D. Cal. 2013).
Standardless enactments
Nev.—Clancy v. State, 313 P.3d 226, 129 Nev. Adv. Op. No. 89 (Nev. 2013).
Ohio—In re Judicial Campaign Complaint Against Stormer, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317 (2013).

4 U.S.—Calop Business Systems, Inc. v. City of Los Angeles, 984 F. Supp. 2d 981 (C.D. Cal. 2013).
Conn.—Gonzalez v. Surgeon, 284 Conn. 573, 937 A.2d 24 (2007).
Iowa—State v. Bower, 725 N.W.2d 435 (Iowa 2006).
N.H.—Montenegro v. New Hampshire Division of Motor Vehicles, 166 N.H. 215, 93 A.3d 290 (2014).
Ohio—In re Judicial Campaign Complaint Against Stormer, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317 (2013).
Inhibition of exercise of First Amendment freedoms
U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

5 Wash.—Bare v. Gorton, 84 Wash. 2d 380, 526 P.2d 379 (1974).

6 Conn.—Thalheim v. Town of Greenwich, 256 Conn. 628, 775 A.2d 947 (2001).
Greater tolerance for imprecision in some types of statutes
D.C.—Vann v. District of Columbia Bd. of Funeral Directors and Embalmers, 480 A.2d 688 (D.C. 1984).

7 Kan.—State ex rel. Murray v. Palmgren, 231 Kan. 524, 646 P.2d 1091 (1982).
Test more stringent where law interferes with First Amendment rights
Idaho—State v. Prather, 135 Idaho 770, 25 P.3d 83 (2001).
Strict scrutiny of statutes impeding First Amendment interests
N.J.—State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).

8 **Due process vagueness standards less exacting**
Tex.—Sanchez v. State, 995 S.W.2d 677 (Tex. Crim. App. 1999).

9 U.S.—U.S. v. Boffa, 513 F. Supp. 444, 7 Fed. R. Evid. Serv. 1734 (D. Del. 1980).
§ 1880.

10 U.S.—Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010).

11 N.J.—State v. Cameron, 100 N.J. 586, 498 A.2d 1217 (1985).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

d. Vagueness and Overbreadth

(2) Vagueness

§ 746. Factors considered in determining vagueness

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1160, 1161

Factors to be considered in deciding whether a statute is unconstitutionally vague, chilling the exercise of First Amendment rights, include whether the statute gives adequate notice of the prohibited conduct and whether the imprecise language encourages the arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of the statute's prohibitions.

Factors to be considered in deciding whether a statute is unconstitutionally vague, chilling the exercise of First Amendment rights, include whether the statute gives adequate notice of the prohibited conduct and whether the imprecise language encourages the arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of the statute's prohibitions.[1] In evaluating constitutional challenges based on claims of vagueness, the particular context is all important, as the contextual application of otherwise unqualified legal language may supply a clue to the statute's meaning and give facially standardless language a constitutionally sufficient concreteness.[2]

The requirement of adequate notice requires the statute convey to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.[3] The objectionable aspects of vagueness need not, however, depend upon the absence of fair notice[4] and impossible standards of specificity are not required.[5] Thus, a statute is not unconstitutionally vague if the meaning of the words used can be fairly ascertained by reference to similar statutes, other judicial determinations, the common law, the dictionary, or the common and generally accepted meaning of the words themselves.[6] A statute is, on the other hand, unconstitutionally vague if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.[7] An act is not unconstitutionally vague merely because a person can conjure up a hypothetical which brings the meaning of some terms into question[8] or because it could have been drafted with greater precision.[9]

Arbitrary interpretation and enforcement.

Although a court should consider many factors in assessing the vagueness of a statute that allegedly violates the First Amendment, including a statute's plain meaning and stated purpose, evidence of arbitrary interpretation and enforcement can support a vagueness claim.[10]

CUMULATIVE SUPPLEMENT

Cases:

When addressing a claim that a statute is unconstitutionally vague, it is erroneous to believe that the mere fact that close cases can be envisioned renders the statute vague; rather, what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved, but instead is the indeterminacy of precisely what that fact is, which is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. People v. Martinez, 59 Cal. App. 5th 280, 273 Cal. Rptr. 3d 505 (6th Dist. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Alaska—Turney v. State, 936 P.2d 533 (Alaska 1997).
Interests underlying void-for-vagueness doctrine
Colo.—Regency Services Corp. v. Board of County Com'rs of Adams County, 819 P.2d 1049 (Colo. 1991).

2 Cal.—People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997).

3 Mo.—Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. 1999).
Vague statute leaves persons of common intelligence to guess at its meaning
Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).

4 Ohio—In re Complaint Against Harper, 77 Ohio St. 3d 211, 673 N.E.2d 1253 (1996).

5 Wash.—American Dog Owners Ass'n v. City of Yakima, 113 Wash. 2d 213, 777 P.2d 1046 (1989).

6 Iowa—State v. Brumage, 435 N.W.2d 337 (Iowa 1989).

7 N.D.—Peters-Riemers v. Riemers, 2001 ND 62, 624 N.W.2d 83 (N.D. 2001).

8 Ill.—In re R.C., 195 Ill. 2d 291, 253 Ill. Dec. 699, 745 N.E.2d 1233 (2001).

9 Colo.—Board of Educ. of Jefferson County School Dist. R-1 v. Wilder, 960 P.2d 695, 128 Ed. Law Rep. 378 (Colo. 1998).

10 U.S.—Jones v. Schneiderman, 974 F. Supp. 2d 322 (S.D. N.Y. 2013).

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16A C.J.S. Constitutional Law § 747

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A. In General

2. First Amendment Guaranties

d. Vagueness and Overbreadth

(2) Vagueness

§ 747. Vagueness on a statute's face

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1160, 1161

A court will refuse to enforce a statute if it finds that it is unconstitutionally vague on its face, such that no set of circumstances exists under which the statute would be valid.

Under the First Amendment, a party may challenge a statute on vagueness grounds by arguing either that the statute is vague as applied to the relevant conduct at issue or that the statute is facially vague.[1] While, ordinarily, when a litigant challenges a statute as void for vagueness, a court confines its inquiry to the statute's applicability to the facts of the case, where a challenged statute, if vague, can intrude on fundamental constitutional guarantees, such as First Amendment rights, a court will refuse to enforce the statute if it finds that it is unconstitutionally vague on its face.[2] In this regard, it has been said that in order for a court to entertain challenges of facial vagueness, the claims must involve First Amendment issues.[3] Thus, where a statute appears to impinge upon First Amendment guarantees, a statute is tested for vagueness on its face because its indefiniteness may have a chilling effect on the exercise of First Amendment liberties.[4] When a vagueness challenge involves First Amendment concerns, the statute

may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct.[5] Such principle is, in essence, a rule of standing allowing a defendant to challenge the validity of a statute even though the statute, as applied to the defendant, is constitutional.[6] To bring a facial vagueness challenge, a party must establish that no set of circumstances exists under which the statute would be valid.[7] It has also been said that a facial challenge for vagueness is available only when a statute reaches a substantial amount of constitutionally protected conduct and when the statute is shown to specify no standard of conduct at all,[8] and that if neither situation exists, only an "as applied to the facts" challenge for vagueness is available.[9]

Footnotes

1 U.S.—U.S. v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2008).

2 Conn.—State v. Cavallo, 200 Conn. 664, 513 A.2d 646 (1986).
No part of facially overbroad statute can be enforced
Wyo.—Rutti v. State, 2004 WY 133, 100 P.3d 394 (Wyo. 2004).

3 Pa.—Com. v. Veon, 2015 PA Super 26, 109 A.3d 754 (2015).

4 Md.—Ayers v. State, 335 Md. 602, 645 A.2d 22 (1994).

5 Tex.—McMillian v. State, 388 S.W.3d 866 (Tex. App. Houston 14th Dist. 2012).

6 Md.—Ayers v. State, 335 Md. 602, 645 A.2d 22 (1994).

7 U.S.—U.S. v. Di Pietro, 615 F.3d 1369 (11th Cir. 2010).

8 Wyo.—Ochoa v. State, 848 P.2d 1359 (Wyo. 1993).

9 Wyo.—Ochoa v. State, 848 P.2d 1359 (Wyo. 1993).

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(3) Overbreadth

(a) In General

§ 748. Statutory overbreadth imperiling First Amendment freedoms, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1163

A statute is ordinarily overbroad if it is so all-encompassing in its reach that it ensnares both protected and nonprotected conduct.

The importance of the First Amendment guarantees to individuals that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact upon the rights guaranteed by the First Amendment[1] to the United States Constitution.[2] More specifically, a statute or regulation is overbroad if it does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps unnecessarily broadly within its ambit other activities that, in ordinary circumstances, constitute the exercise of protected First Amendment rights.[3] Thus, an overbroad statute makes conduct

punishable that, under some circumstances, is constitutionally protected.[4] An overbroad statute is systemically overbroad if there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits.[5]

A statute need not explicitly refer to First Amendment activities in order to be deemed overbroad.[6] Whether or not it is overbroad depends, instead, upon the extent to which it lends itself to improper application to protected conduct.[7] Even a clear and precise enactment may nevertheless be overbroad if, in its reach, it prohibits constitutionally protected conduct.[8] The fact that the coverage of a statute is broader than the specific concern that led to its enactment does not, however, render it unconstitutionally overbroad.[9] The determinative factor is not the prohibition of acts which are commonplace but rather the prohibition of acts which are legitimate.[10] The standard for the determination of such legitimacy is whether the legislative act is within the proper exercise of the police power.[11]

Overbroad statute not void, but voidable.

An overbroad statute is not void but rather voidable and, thus, subject to invalidation notwithstanding the defendant's unprotected conduct, out of solicitude to the First Amendment rights of parties not before the court.[12]

Construction and interpretation.

A promise by the government that it will interpret statutory language in a narrow, constitutional manner cannot, without more, save a potentially unconstitutionally overbroad statute.[13]

CUMULATIVE SUPPLEMENT

Cases:

Invalidation of statutes, for First Amendment overbreadth, is strong medicine that is not to be casually employed. U.S. Const. Amend. 1. United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Amend. I.

2 U.S.—Zalaski v. City of Bridgeport Police Dept., 613 F.3d 336 (2d Cir. 2010).

3 U.S.—Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).
S.D.—State v. Asmussen, 2003 SD 102, 668 N.W.2d 725 (S.D. 2003).
Fundamental question
U.S.—Gillam v. Landrieu, 455 F. Supp. 1030 (E.D. La. 1978).
Statute susceptible to irrational and selective patterns of enforcement
Md.—Finucan v. Maryland Bd. of Physician Quality Assur., 380 Md. 577, 846 A.2d 377 (2004).

4 Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).

5 Alaska—VECO Intern., Inc. v. Alaska Public Offices Com'n, 753 P.2d 703 (Alaska 1988).

6 Nev.—North Nevada Co., Inc. v. Menicucci, 96 Nev. 533, 611 P.2d 1068 (1980).

7 Nev.—North Nevada Co., Inc. v. Menicucci, 96 Nev. 533, 611 P.2d 1068 (1980).

Penal statute prohibiting activity that is legitimate overbroad

Colo.—People v. Gross, 830 P.2d 933 (Colo. 1992).

8 Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).

9 U.S.—Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

10 Colo.—People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

11 Colo.—People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

As to the exercise of police powers by the state, generally, see §§ 699 to 720.

12 U.S.—Massachusetts v. Oakes, 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).

13 U.S.—Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d 519 (3d Cir. 2012).

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(3) Overbreadth

(a) In General

§ 749. Purpose and use of doctrine

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1163

The First Amendment overbreadth doctrine allows an individual whose conduct could be constitutionally regulated by a statute drawn with the requisite specificity to nevertheless attack the statute in light of the danger that it may chill protected expression by those who fear criminal sanctions.

The First Amendment overbreadth doctrine permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity.[1] That is, it allows an individual whose conduct could be constitutionally regulated by a statute drawn with the requisite specificity to nevertheless attack the statute in light of the danger that it may chill protected expression by those who fear criminal sanctions.[2] Overbreadth challenges are permitted in the First Amendment context, not for the benefit of the litigant, but for the benefit of society, to prevent the statute from chilling the constitutionally protected rights of other parties not before the court.[3] The purpose of the doctrine is to ensure

that a statute does not punish innocent conduct,[4] and the doctrine is primarily used as a means to challenge statutes which threaten the exercise of fundamental or express constitutional rights.[5]

The overbreadth analysis is employed to determine whether legislation is within the legitimate limits of the exercise of the state's police power, especially where it is contended that the statute infringes a constitutionally protected right.[6] Where a statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack under the First Amendment.[7] The doctrine is generally only available for the purpose of challenging the validity of statutes which arguably chill or infringe upon First Amendment rights.[8]

Footnotes

1 U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).
Wash.—State v. Glas, 147 Wash. 2d 410, 54 P.3d 147 (2002).

2 U.S.—U.S. v. Fletcher, 634 F.3d 395 (7th Cir. 2011), as amended, (Feb. 23, 2011).
Judicial assumption that overbroad statute will have chilling effect
Fla.—Simmons v. State, 944 So. 2d 317 (Fla. 2006).

3 Tex.—Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

4 Mo.—State v. Beine, 162 S.W.3d 483 (Mo. 2005), as modified on denial of reh'g, (May 31, 2005).
Prohibition of constitutionally protected as well as unprotected conduct
Pursuant to the overbreadth doctrine regarding First Amendment protection of speech, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.
Fla.—Simmons v. State, 944 So. 2d 317 (Fla. 2006).

5 Colo.—People v. Shepard, 983 P.2d 1 (Colo. 1999).

6 Colo.—People v. Smith, 638 P.2d 1 (Colo. 1981).
As to the exercise of police powers by the state, generally, see §§ 699 to 720.

7 U.S.—Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013).

8 U.S.—Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806, 185 L. Ed. 2d 812 (2013).
Nev.—Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002).
Generalized overbreadth challenges in First Amendment issues only
Ohio—State v. Vrabel, 99 Ohio St. 3d 184, 2003-Ohio-3193, 790 N.E.2d 303 (2003).
Criminal statute
Outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.
N.Y.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

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(3) Overbreadth

(a) In General

§ 750. Challenge to facial validity of statute or regulation

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1163

An overbroad statute or regulation is subject to facial invalidation.

An overbroad statute or regulation is subject to facial invalidation,[1] even in instances where its application in the action under consideration may be constitutionally unobjectionable.[2] Facial invalidation of a statute typically requires that no set of circumstances exists under which the law would be valid[3] or that the statute lacks any plainly legitimate sweep.[4] Accordingly, a person to whom a statute may constitutionally be applied may properly challenge a statute or regulation's facial validity on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.[5] The objectionable quality of overbreadth does not depend upon the absence of fair notice to an individual criminally accused, or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence

of a penal statute susceptible of sweeping and improper application.[6] When the overbreadth of a statute is not substantial and real, the statute is not unconstitutional on its face but, rather, unconstitutional application of the statute must be dealt with on a case-by-case basis.[7] Since facial overbreadth adjudication is the exception to traditional rules of practice, its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct, and that conduct, even if expressive, falls within the scope of otherwise valid criminal laws.[8]

Footnotes

1 U.S.—Massachusetts v. Oakes, 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989); Harrell v. The Florida Bar, 608 F.3d 1241 (11th Cir. 2010).

2 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992); Harrell v. The Florida Bar, 608 F.3d 1241 (11th Cir. 2010).

3 U.S.—Bell v. Keating, 697 F.3d 445 (7th Cir. 2012); Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

4 U.S.—Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

5 Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

6 U.S.—Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966).

7 Mont.—State v. Ross, 269 Mont. 347, 889 P.2d 161 (1995).

As to the requirement that the overbreadth of a statute be substantial in order for a challenge grounded in the First Amendment to be supported, generally, see §§ 752, 753.

Realistic danger required

U.S.—New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).

Neb.—State v. Rabourn, 269 Neb. 499, 693 N.W.2d 291 (2005).

8 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).

Facial challenges to criminal statutes on overbreadth grounds discouraged

U.S.—Sabri v. U.S., 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891, 5 A.L.R. Fed. 2d 821 (2004).

16A C.J.S. Constitutional Law § 751

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(3) Overbreadth

(a) In General

§ 751. Requirement that overbreadth be substantial

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1164

A statute may be invalidated on its face only if its overbreadth is substantial, that is, when the statute is unconstitutional in a substantial portion of instances to which it applies.

A statute is not vulnerable to an overbreadth challenge simply because an unconstitutional application can be conceived of or imagined.[1] A statute may, instead, only be invalidated on its face if its overbreadth is substantial, that is, when the statute is unconstitutional in a substantial portion of instances to which it applies.[2] Accordingly, a statute is overbroad only if it reaches a substantial amount of constitutionally protected conduct.[3]

A statute will not be found to be overbroad when a suitable limiting construction is applicable,[4] where there is no narrower way to serve all of the various purposes to which the legislation is directed,[5] or because it is difficult to determine whether the marginal conduct falls within the statutory language.[6] Thus, a successful overbreadth challenge to a statute can be made only when the protected activity is a significant part of the law's target and there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications.[7]

If a statute's overbreadth is substantial, the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.[8] A statute or other rule does not escape potential overbreadth solely because it deals with the demands of property or benefits, is limited to threats involving unlawful conduct, or because it is directed against the use of intimidating words or means of expression.[9]

Footnotes

1 U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); Bushco v. Shurtleff, 729 F.3d 1294 (10th Cir. 2013); U.S. v. Dean, 635 F.3d 1200 (11th Cir. 2011).
Ohio—Buckley v. Wilkins, 105 Ohio St. 3d 350, 2005-Ohio-2166, 826 N.E.2d 811 (2005).

2 Neb.—State v. Rabourn, 269 Neb. 499, 693 N.W.2d 291 (2005).
Social costs
Only substantial overbreadth supports facial invalidation of a law, as there are significant social costs in blocking a law's application to constitutionally protected conduct.
U.S.—Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014).

3 U.S.—Corso v. Fischer, 983 F. Supp. 2d 320 (S.D. N.Y. 2013).
Ga.—Mann v. State, 278 Ga. 442, 603 S.E.2d 283 (2004).
Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

4 U.S.—J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
Mich.—People v. Gaines, 306 Mich. App. 289, 856 N.W.2d 222 (2014).
Minn.—State v. Crawley, 819 N.W.2d 94 (Minn. 2012), cert. denied, 133 S. Ct. 1493, 185 L. Ed. 2d 548 (2013).
Consideration of limiting construction proffered by enforcement agency
Neb.—Robotham v. State, 241 Neb. 379, 488 N.W.2d 533 (1992).

5 U.S.—Nixon v. Administrator of General Services, 408 F. Supp. 321 (D.D.C. 1976), judgment aff'd, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

6 U.S.—Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977).
Marginal infringement
Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).

7 Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).

8 Wyo.—Rutti v. State, 2004 WY 133, 100 P.3d 394 (Wyo. 2004).

9 Or.—State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

2. First Amendment Guaranties

d. Vagueness and Overbreadth

(3) Overbreadth

(b) Duty of Court

§ 752. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1163 to 1165

The doctrine of overbreadth must be applied by the courts with caution, in recognition of the interests of the state in controlling harmful, constitutionally unprotected conduct.

The doctrine of overbreadth must be applied by the courts with caution, in recognition of the interests of the state in controlling harmful, constitutionally unprotected conduct,[1] and must not be casually employed, even in an action involving a First Amendment challenge.[2] The doctrine must, because of the wide-reaching effects of striking down a statute on its face at the request of an individual whose own conduct may be constitutionally punished, be regarded as strong medicine, employed with hesitation, and then only as a last resort.[3] Given the severity of the only remedy for overbreadth under the First Amendment, namely, complete invalidation of the regulation or statute, courts have the duty to avoid constitutional difficulties by applying appropriate narrowing construction where possible.[4]

The court may invalidate a statute as facially overbroad where the statute reaches a substantial amount of constitutionally protected conduct, even if it also has a legitimate application, and it is not readily subject to a narrowing construction.[5] The mere fact that a fundamental right is intermingled with conduct sought to be controlled does not render a regulatory statute overbroad where it is directed toward protecting an important societal interest.[6]

Severable statute.

If the federal statute is not subject to a narrowing construction and is impermissibly overbroad, under the First Amendment, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated.[7]

Footnotes

1 Colo.—Marco Lounge, Inc. v. City of Federal Heights, 625 P.2d 982 (Colo. 1981).

2 Mich.—In re Chmura, 461 Mich. 517, 608 N.W.2d 31 (2000).

3 U.S.—Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999).
N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).
"Manifestly, strong medicine"
U.S.—U.S. v. Hart, 635 F.3d 850 (6th Cir. 2011).
N.D.—Simons v. State, Dept. of Human Services, 2011 ND 190, 803 N.W.2d 587 (N.D. 2011).
Sparingly used, with caution and restraint
Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).
Employed sparingly and only as a last resort
Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).
N.D.—Simons v. State, Dept. of Human Services, 2011 ND 190, 803 N.W.2d 587 (N.D. 2011).

4 D.C.—Pearson v. U.S., 581 A.2d 347 (D.C. 1990).
Narrowing and limiting instruction by court as saving statute
Wash.—Washington State Dept. of Health Unlicensed Practice Program v. Yow, 147 Wash. App. 807, 199 P.3d 417 (Div. 1 2008).

5 Utah—Provo City Corp. v. Thompson, 2004 UT 14, 86 P.3d 735 (Utah 2004).
Protected speech
U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

6 N.J.—Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203, 305 A.2d 807 (Ch. Div. 1973).

7 U.S.—U.S. v. Handley, 564 F. Supp. 2d 996 (S.D. Iowa 2008).

16A C.J.S. Constitutional Law § 753

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

A. In General

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(3) Overbreadth

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§ 753. Determination of substantial overbreadth

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1163 to 1165

In a facial challenge to the overbreadth of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

Substantial overbreadth is the criterion which the courts invoke to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner.[1] In a facial challenge in the context of First Amendment protection of speech, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.[2] Thus, in a facial challenge to the overbreadth of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.[3] Substantial overbreadth demands a realistic danger that the challenged regulation itself will significantly compromise recognized First Amendment protections of parties not before the court,[4] and a court generally does not apply the strong medicine of an

overbreadth analysis where the parties fail to describe instances of arguable overbreadth of the contested law.[5] In making a determination as to whether a statute reaches a substantial amount of constitutionally protected conduct, the court must consider the nature of the state's interest underlying the statute or regulation.[6]

If the restriction of First Amendment freedoms is only incidental to the proper general purpose of regulations and not unnecessarily broad, then the regulations do not violate the First Amendment.[7] Additionally, a court is precluded, by the substantial overbreadth doctrine, from invalidating a statute on its face simply because of the possibility, however slight, that it might be applied in some unconstitutional manner.[8] Thus, a statute is not overbroad in instances where, despite some possibly impermissive application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.[9]

The court must evaluate the ambiguous, as well as the unambiguous, scope of a challenged enactment in determining whether or not it is overbroad.[10] In interpreting a statute to consider whether it suffers from overbreadth, the court must look to the statute's plain language and presume that the legislature used each term advisedly.[11] A court may, in fact, where proper, conclude that the legislature did not intend its terms to operate with the breadth for which the challengers contend.[12]

When analyzing a facial speech challenge to a municipal ordinance, the court of appeals must consider the municipality's authoritative constructions of the ordinance, including its own implementation and interpretation of it.[13]

Measurement of substantiality.

A law must not be invalidated for unconstitutional overbreadth unless it reaches a substantial number of impermissible applications.[14] Measuring the substantiality of a statute's overbreadth requires a rough balancing of the number of valid applications compared to the number of potentially invalid applications.[15] Merely balancing the number of permissible applications is not, however, sufficient.[16] Historic, or likely, frequency of conceivably impermissible applications is relevant and, if that frequency is relatively low, it may be more appropriate to guard against the statute's conceivably impermissible applications through a case-by-case adjudication rather than through a facial invalidation.[17]

CUMULATIVE SUPPLEMENT

Cases:

Determining whether statute is unconstitutionally overbroad under First Amendment is two-step process: first step is to construe challenged statute, followed by second step of evaluating whether statute, as construed, criminalizes substantial amount of protected expressive activity. U.S. Const. Amend. 1. United States v. Hoffert, 949 F.3d 782 (3d Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Md.—Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

2 U.S.—U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); U.S. v. Petrovic, 701 F.3d 849 (8th Cir. 2012).

3 U.S—Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); Preston v. Leake, 660 F.3d 726 (4th Cir. 2011); U.S. v. Hart, 635 F.3d 850 (6th Cir. 2011); U.S. v. Jenkins, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

Idaho—State v. Morton, 140 Idaho 235, 91 P.3d 1139 (2004).

N.Y.—People v. Barton, 12 Misc. 3d 322, 816 N.Y.S.2d 853 (County Ct. 2006), aff'd, 8 N.Y.3d 70, 828 N.Y.S.2d 260, 861 N.E.2d 75 (2006).

Wash.—Washington State Dept. of Health Unlicensed Practice Program v. Yow, 147 Wash. App. 807, 199 P.3d 417 (Div. 1 2008).

Substantial defined

Neb.—State v. Faber, 264 Neb. 198, 647 N.W.2d 67 (2002).

4 Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).

5 U.S.—Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

6 U.S.—Aiello v. City of Wilmington, Del., 623 F.2d 845 (3d Cir. 1980).

7 U.S.—diLeo v. Greenfield, 541 F.2d 949 (2d Cir. 1976).

8 N.H.—State v. Brobst, 151 N.H. 420, 857 A.2d 1253 (2004).

9 U.S.—European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355 (N.D. Ga. 2007).

Md.—Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

Idaho—State v. Leferink, 133 Idaho 780, 992 P.2d 775 (1999).

10 U.S.—Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Neb.—State v. Sinica, 220 Neb. 792, 372 N.W.2d 445 (1985).

11 Utah—I.M.L. v. State, 2002 UT 110, 61 P.3d 1038 (Utah 2002).

12 Or.—State v. Ausmus, 336 Or. 493, 85 P.3d 864 (2003).

13 U.S.—Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011).

14 U.S.—Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008); East Brooks Books, Inc. v. Shelby County, Tenn., 588 F.3d 360 (6th Cir. 2009); U.S. v. Fletcher, 634 F.3d 395 (7th Cir. 2011), as amended, (Feb. 23, 2011); Does 1-5 v. Cooper, 40 F. Supp. 3d 657 (M.D. N.C. 2014).

Ky.—Martin v. Com., 96 S.W.3d 38 (Ky. 2003).

15 **Duty of challenger**

An overbreadth challenger has a duty to provide court with some idea of number of potentially invalid applications statute permits.

U.S.—Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977).

16 U.S.—Aiello v. City of Wilmington, Del., 623 F.2d 845 (3d Cir. 1980).

17 U.S.—Aiello v. City of Wilmington, Del., 623 F.2d 845 (3d Cir. 1980).

As to challenges to the facial validity of a statute impacting First Amendment rights on the ground of overbreadth, generally, see § 750.

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16A C.J.S. Constitutional Law III IX B Refs.

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
West's A.L.R. Digest, Abortion and Birth Control 102, 133
West's A.L.R. Digest, Attorney and Client 62
West's A.L.R. Digest, Constitutional Law 1065, 1078, 1079, 1091, 1092, 1114, 1121(1), 1170, 1171, 1173, 1177, 1186, 1181, 1182, 1188 to 1192, 1196, 1248, 1447, 1472, 1481, 1680 to 1689, 1691, 1693, 1698 to 1701, 1937, 1941 to 1943, 1945 to 1949, 1965, 1967, 1974, 1989 to 1998, 4337, 4384, 4450
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West's A.L.R. Digest, Highways 167
West's A.L.R. Digest, Obscenity 112(9)
West's A.L.R. Digest, Parent and Child 284

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

1. In General

§ 754. First Amendment rights, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1150

Various particular rights and matters, including the right to attend criminal trials and use of the mails, are protected by the First Amendment.

The First Amendment protects various particular rights or matters, such as the right to attend criminal trials,[1] the right to criticize public officials,[2] the use of the mails,[3] or access to the shoulder of a public highway.[4] In addition, the First Amendment protects all purely legal services,[5] communications,[6] and charitable solicitations.[7]

On the other hand, the First Amendment does not protect various particular rights or matters, such as the right to adultery,[8] the right to anonymity,[9] access to all court proceedings[10] or records,[11] the right to break the criminal law,[12] the right to inspect and copy public records,[13] the right to engage in discrimination,[14] the right to ride a motorcycle without a helmet,[15] or the right to block public entry to public or private property.[16] Moreover, the First Amendment does not protect violence,[17] and where there is a threat of violence, the maintenance of the public interest and safety must in certain cases override the right to exercise those First Amendment rights.[18]

Statutes.

Various particular statutes, regulations, or official acts have been found violative of First Amendment rights, such as those imposing a general curfew,[19] and various wiretapping statutes.[20] Likewise, any official action designed to thwart litigation constitutes a clear violation of the First Amendment,[21] as does a statute forbidding one person from paying for the litigation expenses of another.[22] A statutory unvarying percentage limitation on the amount that a charitable organization can pay to a professional fund raiser or professional solicitor is also violative of First Amendment rights.[23]

On the other hand, various particular statutes, regulations, or official acts have been found not violative of First Amendment rights, such as statutes proscribing gambling devices;[24] statutes enhancing a criminal defendant's punishment whenever he or she intentionally selects his or her victim based on the victim's race;[25] statutes prohibiting the placing of prescription drugs in public places;[26] an ordinance prohibiting minors, unless accompanied by a parent, from entering premises where drug paraphernalia are sold;[27] and statutory authorization empowering a union to collect dues from employees in a union shop.[28] Likewise, statutes making it a criminal offense willfully to mutilate and destroy military records,[29] proscribing disturbing of the peace,[30] prohibiting the unauthorized practice of law,[31] or prohibiting the solicitation of personal injury claims by lawyers have been found not to violate the First Amendment.[32] In addition, various other statutes have been found not violative of First Amendment rights, such as statutes authorizing the issuance of an internal revenue summons requiring the production of records,[33] the actual issuance thereof to a third-party financial institution,[34] restricting access to criminal records after a conviction has been expunged,[35] requiring a judge to resign his or her position prior to becoming a candidate for nonjudicial office,[36] or requiring oaths to support the Constitution and laws of the state and nation.[37]

Use or possession of narcotics.

The private possession of narcotics is not a fundamental constitutional right[38] and is not tantamount to the exercise of a First Amendment right.[39] Likewise, the use of narcotics does not constitute the consumption of ideas or information within the ambit of the protection of the First Amendment.[40]

Footnotes

1 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).
Protection of citizen participation in system of self-government
U.S.—Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

2 U.S.—Noel v. McCain, 538 F.2d 633 (4th Cir. 1976).

3 U.S.—Lynch v. Blount, 330 F. Supp. 689 (S.D. N.Y. 1971), judgment aff'd, 404 U.S. 1007, 92 S. Ct. 673, 30 L. Ed. 2d 656 (1972).

4 U.S.—N. L. R. B. v. Monogram Models, Inc., 420 F.2d 1263 (7th Cir. 1969).

5 U.S.—Amusement Devices Ass'n v. State of Ohio, 443 F. Supp. 1040, 10 Ohio Op. 3d 235 (S.D. Ohio 1977).

6 U.S.—Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972).

7 U.S.—NAACP Legal Defense and Educational Fund, Inc. v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981).

8 U.S.—Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982).

9 U.S.—Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978).

10 N.Y.—Gannett Co., Inc. v. Weidman, 102 Misc. 2d 888, 424 N.Y.S.2d 972 (Sup 1980).

11 Kan.—Stephens v. Van Arsdale, 227 Kan. 676, 608 P.2d 972 (1980).

12 U.S.—U.S. v. Best, 476 F. Supp. 34 (D. Colo. 1979).

13 Mich.—In re Midland Pub. Co., Inc., 113 Mich. App. 55, 317 N.W.2d 284 (1982), judgment aff'd, 420 Mich. 148, 362 N.W.2d 580 (1984).

14 U.S.—Grove City College v. Bell, 687 F.2d 684, 6 Ed. Law Rep. 464 (3d Cir. 1982), judgment aff'd, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516, 15 Ed. Law Rep. 1079 (1984).

15 Wash.—City of Bremerton v. Spears, 134 Wash. 2d 141, 949 P.2d 347 (1998).

16 U.S.—U.S. v. Best, 476 F. Supp. 34 (D. Colo. 1979).

17 U.S.—N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).
Cal.—People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997).
Colo.—People v. Bridges, 620 P.2d 1 (Colo. 1980).

18 U.S.—Tatum v. Morton, 402 F. Supp. 719 (D.D.C. 1974), opinion supplemented, 386 F. Supp. 1308 (D.D.C. 1974).
As to the proper exercise of governmental police power, see § 703.

19 U.S.—American Civil Liberties Union of West Tennessee, Inc. v. Chandler, 458 F. Supp. 456 (W.D. Tenn. 1978).
Curfews for minors
(1) A curfew ordinance was not unconstitutionally vague, despite gray areas of an exception making the ordinance inapplicable to juveniles exercising their First Amendment rights, such as the free exercise of religion, freedom of speech, and the right of assembly.
W. Va.—Sale ex rel. Sale v. Goldman, 208 W. Va. 186, 539 S.E.2d 446 (2000).
(2) A city's juvenile curfew ordinance, which provided an exception to prosecution for minors who were engaged in a protected First Amendment activity, was not unconstitutionally vague; it was clear that core First Amendment activities such as political protest and religious worship would be protected, and more marginal cases could be determined case by case.
Alaska—Treacy v. Municipality of Anchorage, 91 P.3d 252 (Alaska 2004).

20 U.S.—Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979).

21 U.S.—Northern Penna. Legal Services, Inc. v. Lackawanna County, 513 F. Supp. 678 (M.D. Pa. 1981).

22 U.S.—American Civil Liberties Union of Tennessee v. State of Tenn., 496 F. Supp. 218 (M.D. Tenn. 1980).

23 N.D.—State ex rel. Olson v. W. R. G. Enterprises, Inc., 314 N.W.2d 842 (N.D. 1982).

24 Tenn.—State v. Burkhart, 58 S.W.3d 694 (Tenn. 2001).
Gambling, as "vice" activity, can be banned altogether
U.S.—U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993).

25 U.S.—Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993).
Belief in white supremacy
Admission in a death penalty proceeding of evidence concerning a defendant's belief in white supremacy does not violate the First Amendment if the evidence is relevant to a determination of an issue before the jury.
Or.—State v. Moore, 324 Or. 396, 927 P.2d 1073 (1996).

26 U.S.—Butala v. State, 71 Wis. 2d 569, 239 N.W.2d 32 (1976).

27 Cal.—Music Plus v. Baker, 125 Cal. App. 3d 819, 178 Cal. Rptr. 415 (2d Dist. 1981).

28 U.S.—Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974).

29 U.S.—Smith v. U.S., 368 F.2d 529 (8th Cir. 1966).

30 Ariz.—State v. Starsky, 106 Ariz. 329, 475 P.2d 943 (1970).
Disorderly conduct
A statute providing that a person commits disorderly conduct by knowingly doing any act in such unreasonable manner as to alarm or disturb another and provoke a breach of the peace is not constitutionally infirm for the reason that it might possibly be misapplied to include activity protected by the First Amendment.
U.S.—U.S. v. Woodard, 376 F.2d 136 (7th Cir. 1967).

31 Conn.—Statewide Grievance Committee v. Patton, 239 Conn. 251, 683 A.2d 1359 (1996).

32 Mich.—Woll v. Kelley, 80 Mich. App. 721, 265 N.W.2d 23 (1978).

33 U.S.—U.S. v. Union Nat. Bank, 371 F. Supp. 763 (W.D. Pa. 1974), aff'd, 506 F.2d 1050 (3d Cir. 1974) and aff'd, 506 F.2d 1053 (3d Cir. 1974).

34 U.S.—U.S. v. Brown, 600 F.2d 248 (10th Cir. 1979).

35 Kan.—Stephens v. Van Arsdale, 227 Kan. 676, 608 P.2d 972 (1980).

36 U.S.—Morial v. Judiciary Commission of State of La., 565 F.2d 295 (5th Cir. 1977).

37 U.S.—Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).
Ala.—Opinion of the Justices, 252 Ala. 351, 40 So. 2d 849 (1949).
Wash.—Hughes v. Kramer, 82 Wash. 2d 537, 511 P.2d 1344 (1973).

38 U.S.—Wolkind v. Selph, 495 F. Supp. 507 (E.D. Va. 1980), aff'd, 649 F.2d 865 (4th Cir. 1981).
Ariz.—State v. Murphy, 117 Ariz. 57, 570 P.2d 1070 (1977).

39 Wash.—State v. Smith, 93 Wash. 2d 329, 610 P.2d 869 (1980).

40 Fla.—Borras v. State, 229 So. 2d 244 (Fla. 1969).

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B. Activities or Persons Protected

1. In General

§ 755. Use of public property or facilities

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 1178

Under the Constitution, a member of the general public has a limited right to use public property.

Under the Constitution, a member of the general public has the right to use public property.[1] The fact that a public facility is operated in a proprietary capacity does not preclude the facility from being subjected to the full impact of the First Amendment.[2] The State may not arbitrarily restrict the freedom of individuals, lawfully on public property, which has been made generally available to the public, to exercise First Amendment rights.[3] A determination that property is a public facility is not the sole judicial inquiry when the exercise of First Amendment rights is at issue, and the crucial inquiry is whether the public facility constitutes an appropriate place for the exercise of First Amendment rights.[4]

The right of a member of the general public to use public property is not, however, an unlimited right.[5] A state may under some circumstances proscribe the use of public property for the exercise of First Amendment rights,[6] and municipal regulation of public facilities through the adoption and application of constitutional standards does not violate the First Amendment.[7] More specifically, the use of a public building for a specific governmental purpose may justify the limitation on the exercise of First

Amendment rights which interferes with that purpose.[8] First Amendment claims are generally examined through the lens of forum analysis, under which the government's interest in limiting the use of its property to its intended purpose is weighed against the interest of those wishing to use the property for other purposes.[9]

In order for an owner of private property to be subjected to the commands of the First Amendment, the property must assume to some significant degree the functional attributes of public property devoted to public use.[10] The more an owner, for his or her advantage, opens up his or her property for use by the public in general, the more his or her rights become circumscribed by the constitutional rights of those who use it.[11]

Public ways and sidewalks.

Public ways and sidewalks occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate.[12] Government officials may impose reasonable regulations and restrictions on the use of public streets and sidewalks without infringing on First Amendment rights,[13] but access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly.[14] Consistent with the traditionally open character of public streets and sidewalks, the government's ability to restrict speech in such locations is very limited.[15]

Shopping centers.

A shopping center has been declared to be the functional equivalent of a community business block for First Amendment purposes.[16]

Airports.

The First and Fourteenth Amendments apply to government-owned airports.[17] While the public areas of an airport have been found to be appropriate and desirable places in which to exercise First Amendment rights,[18] First Amendment freedoms may be subjected to restriction if necessary to further important governmental interests,[19] and public safety and welfare, as well as the efficient operation of an airport, are clearly such important interests.[20] Accordingly, a regulation authorizing the declaration of an emergency because of unusually congested conditions or the necessity of taking emergency security measures, and requiring the cessation of the distribution of literature or the solicitation of contributions, is sufficiently narrow and definite to be a permissible limitation on First Amendment activities.[21]

Buses.

Public buses operated on a regular schedule for the transportation of the public are appropriate places and facilities for the exercise of First Amendment rights.[22]

Footnotes

1 U.S.—Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969), judgment aff'd, 396 U.S. 277, 90 S. Ct. 603, 24 L. Ed. 2d 469 (1970).
Haw.—State v. Jordan, 53 Haw. 634, 500 P.2d 560 (1972).

2 U.S.—Southeastern Promotions, Limited v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972).

3 U.S.—Jones v. Board of Regents of University of Ariz., 436 F.2d 618 (9th Cir. 1970).

Haw.—Nakamoto v. Fasi, 64 Haw. 17, 635 P.2d 946 (1981).

Unemployment compensation office

U.S.—Unemployed Workers Union v. Hackett, 332 F. Supp. 1372 (D.R.I. 1971).

4 U.S.—Southeastern Promotions, Limited v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972).

5 U.S.—Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969), judgment aff'd, 396 U.S. 277, 90 S. Ct. 603, 24 L. Ed. 2d 469 (1970).

Haw.—State v. Jordan, 53 Haw. 634, 500 P.2d 560 (1972).

Access to government property not guaranteed

N.H.—HippoPress, LLC v. SMG (A Pennsylvania Partnership), 150 N.H. 304, 837 A.2d 347 (2003).

6 U.S.—Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1970).

7 U.S.—Southeastern Promotions, Limited v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972).

8 U.S.—U.S. v. Farinas, 448 F.2d 1334 (2d Cir. 1971); Wright v. Incline Village General Improvement Dist., 665 F.3d 1128 (9th Cir. 2011).

Selective access does not transform government property into public forum

U.S.—Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

Welfare office

U.S.—Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969), judgment aff'd, 396 U.S. 277, 90 S. Ct. 603, 24 L. Ed. 2d 469 (1970).

9 U.S.—K.A. ex rel. Ayers v. Pocono Mountain School Dist., 710 F.3d 99, 290 Ed. Law Rep. 446 (3d Cir. 2013).

10 U.S.—Central Hardware Co. v. N.L.R.B., 407 U.S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972).

11 Ill.—City of Chicago v. Rosser, 47 Ill. 2d 10, 264 N.E.2d 158 (1970).

12 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

A.L.R. Library

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction, 71 A.L.R.6th 471.

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum, 70 A.L.R.6th 513.

13 U.S.—Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Cal.—People v. Katz, 70 Cal. App. 3d Supp. 1, 138 Cal. Rptr. 868 (App. Dep't Super. Ct. 1977).

14 U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

Whim of police officer

La.—State v. Muschkat, 706 So. 2d 429 (La. 1998).

Distribution of handbills

An ordinance which purported to restrict the peaceful distribution of handbills and to restrict selling or other business activities upon public sidewalks was unconstitutional.

N.Y.—Blue Bird Coach Lines, Inc. v. City of Niagara Falls, N. Y., 75 A.D.2d 1003, 429 N.Y.S.2d 126 (4th Dep't 1980), order aff'd, 53 N.Y.2d 731, 439 N.Y.S.2d 336, 421 N.E.2d 828 (1981).

15 **Abortion clinic buffer zones**

A state statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed, was not narrowly tailored to serve a significant governmental interest and, thus, violated free speech guarantees; although the government had significant interests in maintaining public safety on streets and sidewalks, as well as in preserving access to adjacent healthcare facilities, buffer zones imposed serious burdens on the speech of sidewalk counselors, including making it substantially more difficult to distribute literature to arriving patients, the State had available to it a variety of other approaches that appeared capable of serving its interests, and the State had not seriously undertaken to address the problem with the less intrusive tools readily available to it.

U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

A.L.R. Library

Validity, Construction, and Application of State Statutes and Municipal Ordinances or Orders Providing Buffer Zones Around Health Care Facilities That Offer Abortion Services, 62 A.L.R.6th 359.

16 Colo.—Handen v. People of City of Colorado Springs, 186 Colo. 284, 526 P.2d 1310 (1974).

17 U.S.—Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).

18 U.S.—International Soc. for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978).

19 § 731.

20 U.S.—International Soc. for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978).

21 U.S.—International Soc. for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978).

22 U.S.—Stoner v. Thompson, 377 F. Supp. 585 (M.D. Ga. 1974).

End of Document

16A C.J.S. Constitutional Law § 756

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

1. In General

§ 756. Marriage, sex, and family

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1173, 1177, 1248, 4384, 4450
West's Key Number Digest, Parent and Child 284

The right to marry and the right of family integrity are fundamental rights which are constitutionally protected.

Generally speaking, "familial relations" involve fundamental constitutional rights.[1]

The right to marry is a fundamental right which is afforded protection by the Constitution.[2] Infringements on the right to marry that are outweighed by compelling state interests, however, are constitutionally permissible.[3]

The Constitution likewise recognizes as fundamental the right of family integrity[4] and protects the family unit, regardless of its relationship or composition, against governmental intrusion not supported by compelling governmental interests.[5] The constitutional protection of the sanctity of the family has been found to extend to family choice and is not confined within an arbitrary boundary drawn at the limits of the "nuclear family" consisting of a couple and its dependent children.[6]

The right of a parent to conceive, bear, nurture, and raise children is one of constitutional dimensions[7] and is a fundamental right.[8] The right is not absolute,[9] however, and is subject to reasonable state regulation pursuant to the police power.[10] Such right may be curtailed or eliminated by state law for the purpose of advancing a compelling state interest.[11] Moreover, the right is accompanied by the responsibility to see that one's children are properly raised so that the rights of other people are protected, and merely because a parent is held responsible for his or her child's torts does not constitute interference with that right.[12]

Generally, the relationship between parents and their children,[13] or the rights of parents over their families, are fundamental and constitutionally protected.[14] More specifically, the right of a parent to the care, custody, companionship, and management of a child is a fundamental right protected by the federal and state constitutions.[15] Any decision terminating or limiting that right also affects such parent's constitutionally protected liberty interest in maintaining his or her familial relationship with the child.[16] The right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment, or substantial neglect is likewise a fundamental right.[17] Furthermore, the right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child.[18]

Parental rights over children, however, are accorded constitutional protection only against unwanted or unreasonable interference by the state.[19] Constitutional restraint on state interference in family matters does not compel protection of parental rights at the expense of ignoring the rights and needs of children.[20] In other words, the family unity need not be preserved at the expense of the best interest of the child,[21] and parental misconduct depriving a child of essential needs is not constitutionally protected.[22] In fact, the interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity and, in the hierarchy of constitutionally protected values, both interests rank as fundamental and must be shielded with equal vigor and solicitude.[23]

Sodomy.

Homosexuals' right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in the home without the intervention of the government.[24] Accordingly, a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct has been found unconstitutional, as applied to adult males who have engaged in the consensual act of sodomy in the privacy of their home, as impinging on their exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[25]

CUMULATIVE SUPPLEMENT

Cases:

Rational basis review, rather than strict scrutiny, applied to determine whether statute, defining widow who was eligible for survivor benefits under Federal Employees Retirement System (FERS) as married to civilian federal employee at least nine months immediately before his death or as mother of children by that marriage, was unconstitutional under Fifth Amendment by allegedly interfering with surviving spouse's exercise of her fundamental rights to marry and procreate and arbitrarily discriminating against widows who did not satisfy nine-month marriage requirement or childbearing requirement. U.S. Const. Amend. 5; 5 U.S.C.A. § 8441(1). Becker v. Office of Personnel Management, 853 F.3d 1311 (Fed. Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Hanson v. Dane County, Wis., 608 F.3d 335 (7th Cir. 2010).

2 U.S.—Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618, 24 Fed. R. Serv. 2d 1313 (1978); Lawson v. Kelly, 2014 WL 5810215 (W.D. Mo. 2014).

Colo.—Beeson v. Kiowa County School Dist. Re-1, 39 Colo. App. 174, 567 P.2d 801 (App. 1977).

Mass.—Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

Institution of marriage is fundamental right

U.S.—Searcy v. Strange, 2015 WL 328728 (S.D. Ala. 2015).

Right to associate freely

Tex.—Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000).

3 U.S.—Rosenbarger v. Shipman, 857 F. Supp. 1282 (N.D. Ind. 1994).

As to the rights of prisoners to marry, generally, see § 775.

Prohibiting marriage of jail employee to inmate

U.S.—Keeney v. Heath, 57 F.3d 579 (7th Cir. 1995).

4 U.S.—Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

Ind.—Matter of Joseph, 416 N.E.2d 857 (Ind. Ct. App. 1981).

Neb.—In re Interest of Clifford M., 261 Neb. 862, 626 N.W.2d 549 (2001).

5 U.S.—Matter of September, 1975 Special Grand Jury, 435 F. Supp. 538 (N.D. Ind. 1977).

Ohio—Saunders v. Clark County Zoning Dept., 66 Ohio St. 2d 259, 20 Ohio Op. 3d 244, 421 N.E.2d 152 (1981).

Pa.—In re William L., 477 Pa. 322, 383 A.2d 1228 (1978).

Deportation of alien parents not prevented by constitution

U.S.—Cervantes v. Immigration and Naturalization Service, Dept. of Justice, 510 F.2d 89 (10th Cir. 1975).

Reciprocal rights of parents and children

The right of a family to remain together without the coercive interference of state power encompasses the reciprocal rights of both parents and children; it is the interest of the parent in the companionship, care, custody and management of the children, and the interest of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.

Conn.—Pamela B. v. Ment, 244 Conn. 296, 709 A.2d 1089 (1998).

6 U.S.—Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

7 U.S.—Sims v. Waln, 536 F.2d 686 (6th Cir. 1976).

Me.—Danforth v. State Dept. of Health and Welfare, 303 A.2d 794 (Me. 1973).

Tex.—In re L. F., 617 S.W.2d 335 (Tex. Civ. App. Amarillo 1981).

Right of parents to direct upbringing of their children

N.H.—In re Rupa, 161 N.H. 311, 13 A.3d 307 (2010).

Right to raise children

Natural parents who have assumed their parental responsibilities have a fundamental right, protected by the United States Constitution and the Kansas Constitution, to raise their children

Kan.—In re Adoption of Baby Girl P., 291 Kan. 424, 242 P.3d 1168 (2010).

Aspects protected

The aspects of childrearing protected from unnecessary intrusion by the government include inculcation of moral standards, religious beliefs, and the elements of good citizenship.

Mass.—Curtis v. School Committee of Falmouth, 420 Mass. 749, 652 N.E.2d 580, 101 Ed. Law Rep. 1047, 52 A.L.R.5th 887 (1995).

Intellectually disabled parent

The right of an intellectually disabled parent to raise a family is a constitutionally protected interest.

Ill.—Helvey v. Rednour, 86 Ill. App. 3d 154, 41 Ill. Dec. 671, 408 N.E.2d 17 (5th Dist. 1980).

8 U.S.—Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), judgment aff'd, 428 U.S. 901, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Alaska—Richard B. v. State, Dept. of Health and Social Services, Div. of Family and Youth Services, 71 P.3d 811 (Alaska 2003).

Ill.—In re Adoption of L.T.M., 214 Ill. 2d 60, 291 Ill. Dec. 645, 824 N.E.2d 221 (2005).

9 Iowa—In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995).

Mass.—Adoption of Iris, 427 Mass. 582, 695 N.E.2d 645 (1998).

W. Va.—State ex rel. Roy Allen S. v. Stone, 196 W. Va. 624, 474 S.E.2d 554 (1996).

Procreative opportunity

An individual is not guaranteed a procreative opportunity but is merely safeguarded from state infringement with procreative potential.

U.S.—Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), judgment aff'd, 428 U.S. 901, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

10 Mass.—In re Adoption of Willow, 433 Mass. 636, 745 N.E.2d 330 (2001).

N.D.—State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

Parens patriae responsibility to protect welfare of children

N.J.—New Jersey Div. of Youth and Family Services v. J.Y., 352 N.J. Super. 245, 800 A.2d 132 (App. Div. 2002).

11 Ill.—Helvey v. Rednour, 86 Ill. App. 3d 154, 41 Ill. Dec. 671, 408 N.E.2d 17 (5th Dist. 1980).

Mass.—Adoption of Iris, 427 Mass. 582, 695 N.E.2d 645 (1998).

Tenn.—Keisling v. Keisling, 92 S.W.3d 374 (Tenn. 2002).

Rational basis test not applicable

U.S.—Application of A. D., 90 Misc. 2d 236, 394 N.Y.S.2d 139 (Sur. Ct. 1977).

12 Conn.—Watson v. Gradzik, 34 Conn. Supp. 7, 373 A.2d 191 (C.P. 1977).

Ill.—Vanthournout v. Burge, 69 Ill. App. 3d 193, 25 Ill. Dec. 685, 387 N.E.2d 341 (2d Dist. 1979).

13 Del.—In Interest of Stevens, 652 A.2d 18 (Del. 1995).

Mass.—Adoption of Simone, 427 Mass. 34, 691 N.E.2d 538 (1998).

Neb.—In Interest of D.W., 249 Neb. 133, 542 N.W.2d 407 (1996).

Okla.—Nelson v. Nelson, 1998 OK 10, 954 P.2d 1219 (Okla. 1998).

Rights included

A parent has a fundamental liberty interest in maintaining a familial relationship with his or her child, and this fundamental liberty interest includes the right of parents to direct the upbringing and education of their children, including the use of reasonable or moderate physical force to control behavior.

Me.—State v. Wilder, 2000 ME 32, 748 A.2d 444 (Me. 2000).

Out-of-wedlock children

An unwed father's immediate and persistent actions in establishing a parent-child relationship with a child born out-of-wedlock are central to the father's obtaining constitutional protection for his parent-child relationship in a subsequent parental rights termination proceeding.

Ariz.—Matter of Appeal in Pima County Juvenile Severance Action No. S-114487, 179 Ariz. 86, 876 P.2d 1121 (1994).

Prospective adoptive parents

Prospective adoptive parents have a limited constitutionally protected liberty interest in their family unit during a preadoption period when a child is placed in their home.

U.S.—Thelen v. Catholic Social Services, 691 F. Supp. 1179 (E.D. Wis. 1988).

14 N.H.—In re Fay G., 120 N.H. 153, 412 A.2d 1012 (1980).

N.Y.—Matter of Gross, 102 Misc. 2d 1073, 425 N.Y.S.2d 220 (Fam. Ct. 1980).

15 U.S.—Gedrich v. Fairfax County Dept. of Family Services, 282 F. Supp. 2d 439 (E.D. Va. 2003).

Idaho—Hoagland v. Ada County, 154 Idaho 900, 303 P.3d 587 (2013), cert. denied, 134 S. Ct. 1024, 188 L. Ed. 2d 119 (2014).

Ky.—Vinson v. Sorrell, 136 S.W.3d 465 (Ky. 2004).

N.J.—V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539, 80 A.L.R.5th 663 (2000).

R.I.—In re Christina V., 749 A.2d 1105 (R.I. 2000).

Part of right of privacy

Mass.—Attorney General v. Bailey, 386 Mass. 367, 436 N.E.2d 139, 4 Ed. Law Rep. 834 (1982).

Noncustodial parent

A noncustodial parent's relationship with his or her child is subject to constitutional guaranties.

U.S.—Ruffalo v. Civiletti, 539 F. Supp. 949 (W.D. Mo. 1982), order aff'd, 702 F.2d 710 (8th Cir. 1983).

16 Me.—Osier v. Osier, 410 A.2d 1027 (Me. 1980).

17 Utah—In re J. P., 648 P.2d 1364 (Utah 1982).

18 N.J.—In re J. S. & C., 129 N.J. Super. 486, 324 A.2d 90 (Ch. Div. 1974), order aff'd, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976).

Child's fundamental liberty

An interference with the fundamental liberty of a child to be raised by his or her parents cannot constitutionally be based on a mere showing of neglect.

Cal.—In re Jack H., 106 Cal. App. 3d 257, 165 Cal. Rptr. 646 (4th Dist. 1980).

19 U.S.—Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

Coercive or compulsory effect

The type of interference necessary to support a parent's claim based on an alleged violation of parental liberty is that which causes a coercive or compulsory effect on the parents' rights.

Mass.—Curtis v. School Committee of Falmouth, 420 Mass. 749, 652 N.E.2d 580, 101 Ed. Law Rep. 1047, 52 A.L.R.5th 887 (1995).

20 N.Y.—People ex rel. Simmons v. Sheridan, 98 Misc. 2d 328, 414 N.Y.S.2d 83 (Sup 1979), aff'd, 79 A.D.2d 896, 435 N.Y.S.2d 871 (1st Dep't 1980), order aff'd, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 429 N.E.2d 1049 (1981).

Pa.—In re William L., 477 Pa. 322, 383 A.2d 1228 (1978).

Rights of parents not absolute

The fundamental liberty interest, protected by the Due Process Clause, of natural parents in the care, custody, and management of their child, is not absolute; it is limited by the compelling government interest in the protection of children, particularly where the children need to be protected from their own parents.

U.S.—Gedrich v. Fairfax County Dept. of Family Services, 282 F. Supp. 2d 439 (E.D. Va. 2003).

21 Mont.—In re M. A. M., 183 Mont. 434, 600 P.2d 203 (1979).

22 U.S.—Beatty v. Lycoming County Children's Services, 439 U.S. 880, 99 S. Ct. 216, 58 L. Ed. 2d 192 (1978).

Pa.—In re William L., 477 Pa. 322, 383 A.2d 1228 (1978).

Medical treatment

Any decision on the part of a parent to decline necessary medical treatment for a child, even though based on constitutional grounds, must yield to the State's interest, as parens patriae, in protecting the health and welfare of the child.

N.Y.—Matter of Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981).

23 Okla.—In re T. H. L., 1981 OK 103, 636 P.2d 330 (Okla. 1981).

Right of child to stable and safe environment

The rights of a child to a stable and safe environment assume an importance at least equal to a parent's constitutional interests.

Mass.—In re Adoption of Willow, 433 Mass. 636, 745 N.E.2d 330 (2001).

24 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

25 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

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16A C.J.S. Constitutional Law § 757

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

1. In General

§ 757. Marriage, sex, and family—Abortion, contraception, and sterilization

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Abortion and Birth Control 102, 133
West's Key Number Digest, Constitutional Law 1094, 4452

Generally, the Constitution protects the right of an individual to be free from unwarranted governmental intrusion into the decision as to whether to bear or beget a child.

Generally, the Constitution protects the right of an individual to be free from unwarranted governmental intrusion into the decision as to whether to bear or beget a child.[1] A woman's right to an abortion during the first trimester of her pregnancy is a fundamental one; however, this right is neither unqualified nor absolute for the duration of the pregnancy to term, and beyond the first trimester, the State has a compelling interest in the health and safety of the mother, by reason of which the State may promulgate rules which are reasonably related to the preservation and protection of maternal health.[2] In order to determine the severity of an obstacle that a regulation places on women seeking abortion, for purposes of determining whether the regulation violates the women's constitutional rights, the court must examine carefully the effect of the regulation on them, considering the real world circumstances; several aspects of those real-world circumstances are helpful in determining the severity of the obstacle, including the means by which the regulation operates on the right to obtain an abortion; the nature and circumstances

of the women affected by the regulation; the availability of abortion services, both prior to and under the challenged regulation; the kinds of harms created by the regulation; and the social, cultural, and political context.[3]

The right to procreate is likewise entitled to constitutional protection;[4] accordingly, a state's interests in maintaining and promoting the marital relationship and in protecting the husband's interest in the procreative potential of marriage are sufficient to justify a burden on a woman's abortion decision imposed by a statutory spousal notification and consultation requirement.[5] Furthermore, women and men have a constitutional right to obtain contraceptives,[6] and the State may not infringe on the rights of a husband and wife to use contraceptives to limit family size although this does not mean that the government has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives.[7]

Right to sterilization.

The right of a person to be sterilized has been implicitly recognized as a fundamental right,[8] and other authorities have explicitly recognized that right.[9] Furthermore, a married woman has a constitutional right to sterilization without the consent of her husband.[10] On the other hand, such a significant deprivation of liberty as forced sterilization must be preceded by significant procedural protections in order to comport with due process.[11]

CUMULATIVE SUPPLEMENT

Statutes:

45 C.F.R. § 131(b) was removed effective October 6, 2017. As to religious exemptions in connection with coverage of certain preventive health services, see 45 C.F.R. § 132; as to moral exemptions in connection with coverage of certain preventive health services.

Cases:

Department of Health and Human Services' (HHS) contraceptives mandate, implementing Patient Protection and Affordable Care Act's (ACA) general requirement that an employer's group health insurance provide coverage for preventive care and screenings for women without any cost sharing requirements, substantially burdened the exercise of religion, for purposes of RFRA, to extent that for-profit closely held corporations were required to provide their employees with insurance coverage for four contraceptive methods that violated the sincerely held religious beliefs of corporations' owners; owners believed that their compliance with the HHS contraceptives mandate would facilitate abortions, while non-compliance would expose them to substantial economic consequences. Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg-13(a)(4); Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b); 45 C.F.R. § 147.130(a)(1)(iv). Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

Commonwealth of Massachusetts demonstrated Article III standing for its substantive challenges to federal interim final rules permitting employers with religious or moral objections to contraception to obtain exemptions from Affordable Care Act's (ACA) contraceptive care coverage requirements, based on an imminent fiscal injury that was fairly traceable to the federal regulations and redressable by a favorable decision; Commonwealth showed that there were employers likely to use the exemptions, and that its costs would most likely rise with increased numbers of women using state-funded contraceptive care. U.S. Const. art. 3, § 2, cl. 1; Public Health Service Act § 2713, 42 U.S.C.A. § 300gg-13(a). Massachusetts v. United States Department of Health and Human Services, 923 F.3d 209 (1st Cir. 2019).

Agencies' alleged need to address uncertainty when issuing new interim final rules (IFRs) allowing employers to opt out of providing no-cost contraceptive coverage under the Patient Protection and Affordable Care Act (ACA) on basis of sincerely held religious beliefs or moral convictions was insufficient to establish good cause for dispensing with notice of and comment to the IFRs; since uncertainty preceded every regulation, to allow uncertainty to excuse compliance with notice-and-comment procedures would have the effect of writing those requirements out of the statute, and in any case, precedent foreclosed the acceptance of uncertainty as a basis for good cause. 5 U.S.C.A. § 553(b)(3)(B). Pennsylvania v. President United States, 930 F.3d 543 (3d Cir. 2019), as amended, (July 18, 2019).

Least-restrictive-means standard for analyzing free exercise claim under Religious Land Use and Institutionalized Persons Act (RLUIPA) is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party. Religious Land Use and Institutionalized Persons Act of 2000, § 3(a), 42 U.S.C.A. § 2000cc–1(a). Jehovah v. Clarke, 798 F.3d 169 (4th Cir. 2015).

Neither Patient Protection and Affordable Care Act's (ACA) contraception-coverage mandate nor the accommodation provision imposed substantial burden on religious exercise of church-affiliated universities and other religious entities, which opposed access to and use of emergency contraceptives, and, thus, they did not violate universities' and entities' rights under RFRA; pursuant to challenged provisions, universities and entities were required to fill out forms to certify their religious opposition, listing contact information for their health insurers and third-party administrators so that government could notify insurers and administrators of their obligation to offer contraceptive coverage, and provide reimbursement to administrators, but the universities and entities themselves were not required to provide or facilitate access to contraceptive coverage, and RFRA did not confer right to challenge conduct of third parties. Religious Freedom Restoration Act of 1993, § 3(a), 42 U.S.C.A. § 2000bb–1(a); Patient Protection and Affordable Care Act, § 1001(a), 42 U.S.C.A. § 300gg–13(a)(4). East Texas Baptist University v. Burwell, 793 F.3d 449 (5th Cir. 2015).

In assessing claim that government action violates Religious Freedom Restoration Act (RFRA), issue of whether government has imposed substantial burden is legal determination. Religious Freedom Restoration Act of 1993, § 2(b)(1), 42 U.S.C.A. § 2000bb(b)(1). Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015).

Religious employer accommodation provided under regulations implementing Patient Protection and Affordable Care Act's (PPACA) mandate to provide group health insurance covering contraceptives, allowing religious employers to opt out from providing coverage for contraceptives by submitting form to administrator or notifying Department of Health and Human Services (HHS) of its objection, did not substantially burden religious employers' free exercise of religion under Religious Freedom Restoration Act (RFRA), although, by opting out, employer shifted its coverage obligation under mandate to third-party health insurance administrator, to avoid substantial penalty, and played small causal role in employee's receiving contraceptive coverage in violation of employer's sincerely held religious beliefs. 26 U.S.C.A. § 4980D(b)(1); Patient Protection and Affordable Care Act, § 1001(a)(4), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 3, 42 U.S.C.A. § 2000bb–1; 45 C.F.R. § 147.131(b). Eternal Word Television Network, Inc. v. Secretary of U.S. Dept. of Health and Human Services, 818 F.3d 1122 (11th Cir. 2016).

Affordable Care Act (ACA) and its implementing regulations, in seeking to promote secular purpose of promoting public health and gender equality, and in providing exemptions and accommodations to ensure that contraceptive coverage provisions of the law did not infringe on religious rights, qualified as neutral and generally applicable law, whose application to pro-life organization of Catholic priests did not violate that organization's First Amendment free exercise rights. U.S. Const. Amend. 1; Pub.L. No. 111148, 124 Stat. 119 (2010); 45 C.F.R. § 147.130(a)(1)(iv)(A). Priests for Life v. United States Department of Health and Human Services, 7 F. Supp. 3d 88 (D.D.C. 2013), aff'd, 772 F.3d 229 (D.C. Cir. 2014), vacated and remanded, 136 S. Ct. 1557, 194 L. Ed. 2d 696 (2016).

Final Rules, which created exemptions from the Patient Protection and Affordable Care Act (ACA) contraceptive coverage requirement for entities asserting religious and moral objections, and made the accommodation process optional, and settlement

agreement non-profit Catholic university entered into with federal agencies, exempting it from all existing and future requirements with respect to contraceptive coverage for its employees and students, were contrary intent of Women's Health Amendment to ACA, which was to ensure access to contraceptive care; plain language of ACA required all group health plans to cover preventative care as defined by Health Resources and Services Administration (HRSA), and HRSA construed preventative care to include all FDA-approved contraceptive methods. Public Health Service Act § 2713, 42 U.S.C.A. § 300gg-13(a)(4). Irish 4 Reproductive Health v. United States Department of Health and Human Services, 434 F. Supp. 3d 683 (N.D. Ind. 2020).

Patient Protection and Affordable Care Act (ACA) did not provide federal agencies with authority to issue new interim rules allowing employers to opt out of providing no-cost contraceptive coverage under Patient Protection and Affordable Care Act (ACA) on basis of sincerely held religious beliefs or moral convictions; given that there was no religious or moral exemption in ACA's text and there was one for grandfathered health plans, it could not be assumed that Congress authorized agencies to create additional exemptions, fact that ACA did not contain language specifically precluding agencies from creating exemptions did not indicate that they had authority to do so, and textual structure of ACA did not permit Health Resources and Services Administration (HRSA) to proscribe the "manner or reach" of women's preventive care and screenings covered by ACA. 42 U.S.C.A. § 18011(e); Public Health Service Act § 2713, 42 U.S.C.A. § 300gg-13(a)(3)-(4). Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).
Mass.—Moe v. Secretary of Administration and Finance, 382 Mass. 629, 417 N.E.2d 387 (1981).
Minn.—Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

2 N.J.—Livingston v. New Jersey State Bd. of Medical Examiners, 168 N.J. Super. 259, 402 A.2d 967 (App. Div. 1979).
Minor's right to abortion
(1) As applied to an unemancipated minor girl living with and dependent upon her parents and making no claim or showing as to her maturity or as to her relations with her parents, a statute requiring a physician to "notify, if possible," the parents or guardian of the minor upon whom the abortion is to be performed was narrowly drawn to protect only those interests and did not violate any guarantees of the Constitution.
U.S.—H. L. v. Matheson, 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981).
(2) A state constitution's right to privacy was not violated by statutes requiring an unemancipated minor to obtain the consent of both parents or the approval of a chancery court before obtaining an abortion.
Miss.—Pro-Choice Mississippi v. Fordice, 716 So. 2d 645 (Miss. 1998).
Mandatory consultation and delay
A state constitution's right to privacy was not violated by a statute requiring a mandatory consultation and 24-hour delay before a woman has an abortion.
Miss.—Pro-Choice Mississippi v. Fordice, 716 So. 2d 645 (Miss. 1998).

3 U.S.—Planned Parenthood Southeast, Inc. v. Strange, 33 F. Supp. 3d 1330 (M.D. Ala. 2014).
Twenty-four-hour waiting period for abortion upheld
Mo.—Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 (Mo. 2006).

4 Tenn.—Doe v. Sundquist, 2 S.W.3d 919 (Tenn. 1999).

5 U.S.—Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981).

6 U.S.—Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

7 U.S.—Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).
Sale of contraceptives to unmarried persons
A statute forbidding the sale of contraceptive devices to unmarried persons is unconstitutional.
U.S.—Baird v. Lynch, 390 F. Supp. 740 (W.D. Wis. 1974).

Sale of contraceptives to minors

The practice of a publicly operated family planning clinic of distributing contraceptive devices and medication to unemancipated minors without notice to their parents did not infringe upon a constitutional right of the parents.

U.S.—Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980).

8 Mass.—Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982).

9 U.S.—Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978).

Colo.—Matter of A. W., 637 P.2d 366 (Colo. 1981).

10 N.J.—Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975).

11 U.S.—Doe ex rel. Tarlow v. District of Columbia, 920 F. Supp. 2d 112 (D.D.C. 2013).

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16A C.J.S. Constitutional Law § 758

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

1. In General

§ 758. Obscenity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1174, 1175
West's Key Number Digest, Obscenity 112(9)

Obscenity is not generally within the scope of First Amendment protection.

In general, obscenity is not within the scope of First Amendment protection.[1] In fact, any constitutional right of privacy to possess obscene materials is restricted to the home.[2] Moreover, the First Amendment does not prevent the State from declaring the commission of an obscene act to be criminal.[3] Statutes proscribing the distribution of obscene material have also been found constitutional[4] as have statutes making it a crime to promote obscene devices.[5]

The governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment looks at: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or

scientific value.[6] The obscenity exception to the First Amendment is not broad enough to cover whatever the legislature happens to find shocking.[7]

Child pornography.

Child pornography, like obscenity, is unprotected by the First Amendment.[8] A statute prohibiting production of child pornography is a conduct-regulating statute reflecting a legitimate government interest that is not substantially overbroad under the First Amendment.[9] The government may ban even personal possession of child pornography because such possession is directed toward the evils of child exploitation and is not merely a paternalistic interest in regulating the defendant's mind.[10] Moreover, a statute prohibiting even private mailings of pedophilic materials does not infringe on the right to privacy.[11]

Sexually oriented enterprises.

Municipalities may constitutionally bar adult establishments from, or within, a specified distance of residentially zoned areas and facilities in which families and children congregate.[12] A zoning ordinance restricting the location of adult entertainment businesses, though claimed by the operators of such businesses to prevent their making a profit, do not infringe the operators' First Amendment rights since it does not deny them the reasonable opportunity to open and operate such businesses within the city.[13] Where regulations dealing with the zoning of certain sexually oriented commercial enterprises do not attempt to zone businesses such as bookstores or movie theatres, so that First Amendment interests are not at stake, the provisions are to be analyzed by traditional standards applicable to zoning regulations.[14]

Footnotes

1 U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); U.S. v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971).
Conn.—State v. LeWitt, 3 Conn. Cir. Ct. 605, 222 A.2d 579 (App. Div. 1966).
Utah—State v. Morrison, 2001 UT 73, 31 P.3d 547 (Utah 2001).

2 Okla.—Davis v. State, 1996 OK CR 15, 916 P.2d 251 (Okla. Crim. App. 1996).
Film processing
Any right to privately possess obscene materials does not entitle one to have obscene photographic film slides processed by a commercial developer and returned to him or her.
Ga.—Warshaw v. Eastman Kodak Co., 148 Ga. App. 670, 252 S.E.2d 182 (1979).

3 Cal.—Silva v. Municipal Court, 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1st Dist. 1974) (disapproved of on other grounds by, Pryor v. Municipal Court, 25 Cal. 3d 238, 158 Cal. Rptr. 330, 599 P.2d 636 (1979)).

4 Ga.—Morrison v. State, 272 Ga. 129, 526 S.E.2d 336 (2000).

5 La.—State v. Brenan, 772 So. 2d 64 (La. 2000).

6 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).

7 U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

8 U.S.—U.S. v. Price, 775 F.3d 828 (7th Cir. 2014); U.S. v. Stewart, 839 F. Supp. 2d 914 (E.D. Mich. 2012).
Utah—State v. Morrison, 2001 UT 73, 31 P.3d 547 (Utah 2001).
Well-known friction
The application of the First Amendment is not without limits although a well-known friction exists between its protection and the enactment of laws related to obscenity and child pornography.
Kan.—State v. Zabrinas, 271 Kan. 422, 24 P.3d 77 (2001).

9 U.S.—U.S. v. Lebowitz, 676 F.3d 1000, 88 Fed. R. Evid. Serv. 86 (11th Cir. 2012), cert. denied, 133 S. Ct. 1492, 185 L. Ed. 2d 547 (2013).

10 Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

11 U.S.—U.S. v. Andersson, 803 F.2d 903, 86 A.L.R. Fed. 349 (7th Cir. 1986).

12 N.Y.—Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998).

13 R.I.—DiRaimo v. City of Providence, 714 A.2d 554 (R.I. 1998).

14 U.S.—Stansberry v. Holmes, 613 F.2d 1285 (5th Cir. 1980).

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16A C.J.S. Constitutional Law § 759

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

1. In General

§ 759. Other rights or matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Attorneys and Legal Services 86, 1291 to 1300
West's Key Number Digest, Constitutional Law 1065, 1079, 1114, 1121(1), 1170
West's Key Number Digest, Health 903
West's Key Number Digest, Highways 167

The constitutional guaranties or protections have been found to extend to various particular rights or matters, including the right to work, but other particular rights, such as the receipt of welfare assistance, are not of constitutional dimension.

In the light of the principles relating to personal, civil, and political rights and freedoms generally,[1] the constitutional guaranties or protections have been found to include or extend to various particular rights or matters, such as the right to form one's own opinions[2] and aesthetic and moral judgments;[3] the right to free passage on the public highways;[4] the right to a clean and healthful environment;[5] the right of access to retained counsel;[6] the right to make independent medical choices,[7] including the right to refuse unwanted medical treatment[8] and the choice of health care provider;[9] the right to inform the civil authorities of a violation of federal law;[10] and the right to work.[11]

On the other hand, the constitutional guaranties or protections have been found not to include or extend to various other particular rights or matters, such as the right to interfere with law enforcement officers and firefighting personnel engaged in civil emergencies;[12] access to safe or adequate housing,[13] or to a permanent, stable home,[14] or to welfare assistance;[15] the right to gamble;[16] and the right to perform military service or to join the armed services.[17] Furthermore, the constitutional guaranties do not include or extend to the right to juvenile treatment,[18] the right to operate a motor vehicle,[19] the right to conceal or destroy evidence of criminal conduct,[20] the right to be given a polygraph test,[21] the right to televise trials,[22] the right to flee an accident scene,[23] and the right to an appointed counsel for an employment discrimination claim.[24]

Receipt of government benefits.

Provision for governmental benefits may not be conditioned on a waiver of protected rights,[25] and the denial of a public benefit may not be used by the government to achieve what it may not command directly.[26]

Right to serve on jury.

The right to serve on a jury has been found to be an incident of citizenship, which may not be invaded by arbitrary judicial action.[27]

Searches and seizures.

In applying the Fourth Amendment to electronic surveillance in internal security matters, there must be a balancing of the duty of the government to protect the domestic security and of protection of individual privacy and free expression from unreasonable surveillance.[28]

Physicians.

Physicians do not obtain by mere licensure any constitutional right to staff privileges at any particular hospital, and additional standards beyond the minimum criteria may be imposed so long as they are reasonable and reasonably related to the operation of the hospital.[29] Furthermore, there is no constitutional basis for the recognition of a right on the part of physicians to control patient access to information concerning the possible side effects of prescription drugs so that requiring patient package inserts to be dispensed with certain drugs does not interfere with any constitutionally protected right of physicians.[30]

Footnotes

1 §§ 721 to 753.

2 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

3 U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

4 Cal.—People v. Glover, 93 Cal. App. 3d 376, 155 Cal. Rptr. 592 (1st Dist. 1979).

5 Mont.—Northern Plains Resource Council, Inc. v. Montana Bd. of Land Com'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169 (2012).

6 U.S.—Mosley v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir. 1981).

7 Alaska—Rollins v. Ulmer, 15 P.3d 749 (Alaska 2001).
Mont.—Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999).

8 N.D.—State ex rel. Schuetzle v. Vogel, 537 N.W.2d 358, 66 A.L.R.5th 707 (N.D. 1995).

9 Ariz.—Holmes v. Hoemako Hospital, 117 Ariz. 403, 573 P.2d 477, 7 A.L.R.4th 1231 (1977).
Mont.—Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999).

10 U.S.—E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982).

11 Ill.—Levin v. Civil Service Commission of Cook County, 52 Ill. 2d 516, 288 N.E.2d 97 (1972).

12 Pa.—Com. v. Saxon, 219 Pa. Super. 64, 275 A.2d 876 (1971).

13 U.S.—Bosely v. City of Euclid, 496 F.2d 193 (6th Cir. 1974); Caton v. Barry, 500 F. Supp. 45 (D.D.C. 1980).
No constitutional right to low-income housing
U.S.—Weems v. Pierce, 534 F. Supp. 740 (C.D. Ill. 1982).

14 U.S.—Child v. Beame, 412 F. Supp. 593, 22 Fed. R. Serv. 2d 802 (S.D. N.Y. 1976).

15 U.S.—Alcala v. Burns, 545 F.2d 1101 (8th Cir. 1976).
Pa.—Travis v. Department of Public Welfare, 2 Pa. Commw. 110, 277 A.2d 171 (1971), order aff'd, 445 Pa. 622, 284 A.2d 727 (1971).
Disclosure of welfare files
A welfare recipient's right not to have his welfare files disclosed to the press was not a right secured by the Constitution.
U.S.—Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), opinion aff'd, 547 F.2d 436 (8th Cir. 1977).

16 U.S.—U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993).

17 U.S.—West v. Brown, 558 F.2d 757 (5th Cir. 1977); Waide v. Waller, 402 F. Supp. 922 (N.D. Miss. 1975); Williams v. U.S., 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

18 N.Y.—People v. Putland, 102 Misc. 2d 517, 423 N.Y.S.2d 999 (County Ct. 1979).
Wyo.—Hansen v. State, 904 P.2d 811 (Wyo. 1995).

19 Va.—Walton v. Com., 255 Va. 422, 497 S.E.2d 869 (1998).

20 Cal.—People v. Bracamonte, 15 Cal. 3d 394, 124 Cal. Rptr. 528, 540 P.2d 624 (1975).

21 Ark.—Wilson v. State, 277 Ark. 43, 639 S.W.2d 45 (1982).

22 Okla.—Nichols v. District Court of Oklahoma County, 2000 OK CR 12, 6 P.3d 506 (Okla. Crim. App. 2000).

23 U.S.—California v. Byers, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).

24 U.S.—Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 3 Ed. Law Rep. 308 (9th Cir. 1982).

25 U.S.—Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979).

26 U.S.—Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

27 Ark.—Buchanan v. State, 214 Ark. 835, 218 S.W.2d 700 (1948).

28 U.S.—U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

29 U.S.—Truly v. Madison General Hospital, 673 F.2d 763 (5th Cir. 1982).

30 U.S.—Pharmaceutical Mfrs. Ass'n v. Food and Drug Administration, 484 F. Supp. 1179 (D. Del. 1980), judgment aff'd, 634 F.2d 106 (3d Cir. 1980).

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16A C.J.S. Constitutional Law § 760

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

2. Educational Matters

§ 760. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1078, 1188, 1191, 1965, 1967, 1974

First Amendment rights, applied in light of the special characteristics of a school environment, are available to persons involved in the educational process.

Public educational institutions, including those of higher learning, are not enclaves immune from the sweep of the First Amendment rights.[1] Such rights are available to persons involved in the educational process[2] although they must be applied in light of the special characteristics of a school environment.[3] School authorities are not exempt from the operation and limitations of the First Amendment,[4] and their discretion in matters of education must be exercised in a manner that comports with the First Amendment.[5]

A state has a compelling interest in the proper functioning of a school system, and the special characteristics of the school environment permit reasonable and narrowly defined limitations upon the exercise of First Amendment freedoms.[6] The First Amendment Free Speech Clause does not require school officials to wait until disruption actually occurs before they may act, and in fact, they have a duty to prevent the occurrence of disturbances.[7] The interest of a state in maintaining an educational

system is a compelling one which gives rise to a balancing of First Amendment rights with the duty of the state to further and to protect the public school system.[8] The applicable test to be applied in determining whether a public school administration might interfere with First Amendment rights is whether the school authorities might reasonably forecast a substantial disruption of, or material interference with, school activities.[9] Furthermore, imposed limitations may extend to the regulation of nonstudent activity on public or private property adjacent to school grounds if it is carried on in such manner as to disturb school activities.[10]

School regulations affecting First Amendment rights require a certain degree of specificity because of the fundamental rights involved.[11] It has been found that a school activity which is made available to students, faculty, or even the general public must be operated in accord with First Amendment principles.[12] In this regard, a statute which provides for the voluntary recitation of the pledge of allegiance to the flag in public schools does not violate the First Amendment.[13] Moreover, a statute establishing the criteria and procedures to be employed in approving the proposed curricula of private and business schools does not violate the schools' First Amendment rights, where the provisions are content-neutral and narrowly tailored to serve the state's legitimate interest in preventing fraud, and adequate safeguards are included to ensure that the State would reach a decision on the proposed curricula in a timely fashion.[14] However, prohibition of the expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not permissible under the First Amendment.[15] Similarly, even if past racial incidents justify a ban on disruptive expressions in a school, under the First Amendment, a school may not impose a viewpoint-specific ban on some racially divisive symbols and not others.[16]

Curriculum selection.

Public schools have broad discretion under the First Amendment's freedom of speech guarantee in making choices regarding the selection and implementation of a "curriculum," including the lessons students need to understand and the best way to impart those lessons.[17]

Academic freedom.

Academic freedom, which is a special concern of the First Amendment,[18] is entitled to some measure of constitutional protection.[19] Academic freedom, however, like other constitutional rights, is not absolute, and must on occasion be balanced against important competing interests, although to prevail over academic freedom, the interests of the government must be strong and the extent of the intrusion carefully limited.[20]

Financial assistance; sex discrimination.

In view of the fact that a college could terminate its participation in a grant program and avoid statutory requirements, a statute conditioning receipt by students of federal financial assistance on compliance by the college with a statute prohibiting sex discrimination in any educational program receiving such assistance does not violate the First Amendment rights of the college or the students.[21]

CUMULATIVE SUPPLEMENT

Cases:

Fact that Indiana statute criminalizing the acquisition, receipt, sale, and transfer of aborted fetal tissue prevented state university from actively participating in research and scholarship using aborted fetal tissue did not violate university's academic freedom

under First Amendment; enforcement of rules about conduct was not equivalent to prohibitions of speech. U.S. Const. Amend. 1; Ind. Code Ann. § 35-46-5-1.5. Trustees of Indiana University v. Curry, 918 F.3d 537 (7th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); Gay Lib v. University of Missouri, 558 F.2d 848, 50 A.L.R. Fed. 496 (8th Cir. 1977); Keeton v. Anderson-Wiley, 664 F.3d 865, 275 Ed. Law Rep. 74 (11th Cir. 2011).

Extent of rights

First Amendment rights on college campuses are coextensive with those in the community at large.

U.S.—Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973).

2 U.S.—Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54 (E.D. Ark. 1978), judgment aff'd, 594 F.2d 699 (8th Cir. 1979).

Cal.—Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1st Dist. 1969).

Vt.—Petitions of Davenport, 129 Vt. 546, 283 A.2d 452 (1971).

3 U.S.—Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977).

Cal.—Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1st Dist. 1969).

Protection of educational process

Courts must balance First Amendment rights against the State's interest in preserving and protecting its educational process.

U.S.—Vanderzanden v. Lowell School Dist. No. 71, 369 F. Supp. 67 (D. Or. 1973).

4 U.S.—Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), judgment aff'd, 668 F.2d 214, 2 Ed. Law Rep. 379 (3d Cir. 1981).

5 U.S.—Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).

6 U.S.—Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977); Tate v. Board of Ed. of Jonesboro, Ark., Special School Dist., 453 F.2d 975 (8th Cir. 1972).

7 U.S.—Wynar v. Douglas County School Dist., 728 F.3d 1062, 297 Ed. Law Rep. 32 (9th Cir. 2013).

8 U.S.—Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

Prohibition of beards

The school board's determination that employees would be prohibited from wearing beards did not violate employees' constitutional liberty interest in choosing how to wear their hair where the hairstyle regulation was a reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority, and compelling uniformity.

U.S.—Domico v. Rapides Parish School Bd., 675 F.2d 100, 3 Ed. Law Rep. 815 (5th Cir. 1982).

9 U.S.—Koppell v. Levine, 347 F. Supp. 456 (E.D. N.Y. 1972).

More than mere intuition

Although school officials may prohibit speech under the First Amendment based on a forecast that the prohibited speech will lead to a material disruption, the proscription cannot be based on the officials' mere expectation that the speech will cause such a disruption; school officials must base their decisions on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.

U.S.—Bell v. Itawamba County School Bd., 774 F.3d 280, 312 Ed. Law Rep. 550 (5th Cir. 2014), reh'g en banc granted, 2015 WL 1636735 (5th Cir. 2015).

Expressive activity

Since First Amendment rights must be accommodated to the special characteristics of the school environment, expressive activity can be restricted if the forbidden conduct materially disrupts classwork.

Ind.—Hicks v. State, 260 Ind. 204, 294 N.E.2d 613 (1973).

10 Cal.—People v. Hirst, 31 Cal. App. 3d 75, 106 Cal. Rptr. 815 (4th Dist. 1973).

Leaving school

Disruptions immediately after school can affect the school's learning environment and, therefore, leaving school can properly be considered a "normal school activity" for a junior high school, such that curtailment of expressive activity causing the disruption will not violate the First Amendment.

U.S.—Carr v. City of Hillsboro, 497 F. Supp. 2d 1197, 223 Ed. Law Rep. 670 (D. Or. 2007).

11 U.S.—Hall v. Board of School Com'rs of Mobile County, Ala., 496 F. Supp. 697 (S.D. Ala. 1980), aff'd in part, rev'd in part on other grounds, 681 F.2d 965, 5 Ed. Law Rep. 370, 65 A.L.R. Fed. 196 (5th Cir. 1982).

Reasonable relationship

In the area of First Amendment rights, rules formulated by school officials must be reasonably related to the needs of the educational process and any disciplinary action taken pursuant to those rules must have a basis in fact.

U.S.—James v. Board of Ed. of Central Dist. No. 1 of Towns of Addison et al., 461 F.2d 566 (2d Cir. 1972).

12 U.S.—Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), modified on other grounds on reh'g, 489 F.2d 225 (5th Cir. 1973).

13 N.H.—Opinion of The Justices, 113 N.H. 297, 307 A.2d 558 (1973).

14 U.S.—New York State Ass'n of Career Schools v. State Educ. Dept. of State of N.Y., 823 F. Supp. 1096, 84 Ed. Law Rep. 194 (S.D. N.Y. 1993).

15 U.S.—Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).

16 U.S.—B.W.A. v. Farmington R-7 School Dist., 508 F. Supp. 2d 740, 225 Ed. Law Rep. 405 (E.D. Mo. 2007), aff'd, 554 F.3d 734, 241 Ed. Law Rep. 41 (8th Cir. 2009).

17 U.S.—Ward v. Polite, 667 F.3d 727, 276 Ed. Law Rep. 593 (6th Cir. 2012).

18 U.S.—Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

Wash.—Stastny v. Board of Trustees of Central Washington University, 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).

Contempt conviction improper

Where a college professor was questioned by the State, concerning the content of the professor's lectures and his knowledge of a particular political party and its adherents, a contempt conviction for the refusal to answer was an invasion of the professor's liberties in the area of academic freedom.

U.S.—Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

19 U.S.—Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

Conn.—Craine v. Trinity College, 259 Conn. 625, 791 A.2d 518, 162 Ed. Law Rep. 824 (2002).

Chilling effect on others

Although academic freedom is not one of the enumerated rights of the First Amendment, the right to teach, inquire, evaluate, and study is fundamental to democratic society, and First Amendment safeguards will be quickly brought into play to protect the right of academic freedom because an unwarranted invasion of such right will tend to have a chilling effect on the exercise of the right by others.

Wash.—Stastny v. Board of Trustees of Central Washington University, 32 Wash. App. 239, 647 P.2d 496, 5 Ed. Law Rep. 256 (Div. 3 1982).

Extent of protection

Whatever constitutional protection is afforded with respect to academic freedom by the First Amendment extends as readily to a scholar in a laboratory as to a teacher in a classroom.

U.S.—Dow Chemical Co. v. Allen, 672 F.2d 1262, 3 Ed. Law Rep. 274 (7th Cir. 1982).

20 U.S.—Dow Chemical Co. v. Allen, 672 F.2d 1262, 3 Ed. Law Rep. 274 (7th Cir. 1982).

As to the proposition that the First Amendment does not necessarily give teachers of younger students the same academic freedom that they give to teachers of college students, see § 761.

Teaching methods

The First Amendment guarantee of academic freedom does not require a university to tolerate any manner of teaching method a professor may choose to employ.

S.D.—Yarcheski v. Reiner, 2003 SD 108, 669 N.W.2d 487, 181 Ed. Law Rep. 233 (S.D. 2003).

21 U.S.—Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516, 15 Ed. Law Rep. 1079 (1984).

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Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

2. Educational Matters

§ 761. Teachers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1078, 1190, 1191, 1447, 1989 to 1998

First Amendment rights are available to teachers, and they do not shed their constitutional rights by reason of their employment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers,[1] and they do not shed their constitutional rights by reason of their employment.[2] Teachers have the same rights as other employees to be free from restraints on non-employment-related conduct which is subject to constitutional protection.[3] In addition, a teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing even though the subject matter may be controversial or sensitive.[4] Nevertheless, while limitations on the exercise of First Amendment rights by teachers cannot be so disruptive as to impede a teacher's performance or to interfere with the operation of a school, and must involve matters of public interest,[5] the First Amendment protection of a teacher's speech depends upon a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.[6]

A public educational institution may not refuse to employ a prospective member of its faculty by reason of his or her exercise of First Amendment rights.[7] Furthermore, the dismissal of a teacher must respect the requirements of the First Amendment.[8] Accordingly, a teacher may not be dismissed or not rehired for constitutionally impermissible reasons even though he or she is without tenure or an expectancy of reemployment.[9] A nontenured teacher who alleges that he or she has not been rehired in violation of his or her First Amendment rights bears an initial burden of establishing that his or her conduct is constitutionally protected and that the protected conduct has been a substantial or motivating factor in the decision of the school authority not to rehire; if the burden is sustained, the authority has the burden of showing by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.[10]

While teachers' exercise of First Amendment rights in the schools is subject to reasonable regulation, a school authority may not infringe such rights in the absence of a showing that there would be a substantial and material interference with appropriate school discipline.[11] In this regard, the authority may rely on reasonable inferences drawn from concrete facts but not on the mere apprehension or speculation that disturbances or interferences with appropriate discipline may occur.[12] When a teacher presents a colorable claim that school authorities have infringed on his or her First Amendment rights, the authorities must demonstrate a reasonable basis for concluding that such conduct threatens to impair their legitimate interests in regulating the school curriculum.[13]

In the light of the foregoing principles, various particular statutes, regulations, or actions of school authorities relating to teachers have been deemed violative of their constitutional rights, such as regulations precluding a teacher from receiving a full salary if, as a mere matter of dogma, he or she believes that teachers should be free to strike[14] or prohibiting a teacher from making any statement in any action to which the municipality or its agency is a party.[15] On the other hand, various particular statutes, regulations, or actions of school authorities relating to teachers are not violative of their constitutional rights, such as requirements imposing a dress code upon teachers;[16] education law provisions permitting, but not requiring, the involuntary retirement of any teacher who has attained a specified age;[17] and a requirement that teachers teach history classes in a conventional manner.[18]

Academic freedom.

Academic freedom is a special concern of the First Amendment, and no more direct assault on academic freedom can be imagined than for the school authorities to refuse to hire a teacher because of his or her philosophical, political, or ideological beliefs.[19] However, the First Amendment does not necessarily give teachers of younger students the same academic freedom that they give to teachers of college students.[20] Furthermore, a material or substantial degree of disruption of the community in which the school is located does not establish a material or substantial degree of disruption in schools for purposes of determining whether a school authority can seek to control a teacher's academic freedom; accordingly, the action of a school district in discharging a teacher solely by reason of his or her introducing a survey into the classroom which offends the dominant views or beliefs of the community, but causes no disruption in the schools, constitutes a violation of the First Amendment.[21] Likewise, the First Amendment protection of academic freedom prevents courts from substituting their judgment for the judgment of a university, regarding which faculty members should be granted tenure.[22] On the other hand, a teacher's refusal to assign a grade as instructed by superiors is not a principle of academic freedom protected by the First Amendment.[23]

Sexual relationship between teacher and student.

The sexual relationship between a teacher and a student at the same school is not a relationship that warrants protection as a fundamental right; therefore, a rational basis test must be used to decide the constitutionality of a statute making such conduct a crime. Under such a test, the government has a legitimate interest in promoting the preservation of a safe school environment

for students by preventing their sexual exploitation and to preserve the trust that parents and the public have with teachers, who are in the unique position to groom or coerce students into exploitative or abusive conduct.[24]

Footnotes

1 U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
Cal.—Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1st Dist. 1969).
Vt.—Petitions of Davenport, 129 Vt. 546, 283 A.2d 452 (1971).
Untenured university employees
Untenured university employees enjoy the same First Amendment freedoms as tenured faculty members.
S.D.—Yarcheski v. Reiner, 2003 SD 108, 669 N.W.2d 487, 181 Ed. Law Rep. 233 (S.D. 2003).
Reduction of professor's salary
Where a recommended salary increase for a university professor was subjected to stricter scrutiny by the university president because of the professor's political activities and his salary was ultimately reduced, such activities were a substantial or motivating factor in the denial of an increase and such denial violated the professor's First Amendment rights.
U.S.—Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981).

2 U.S.—Connecticut State Federation of Teachers v. Board of Ed. Members, 538 F.2d 471 (2d Cir. 1976); Pred v. Board of Public Instruction of Dade County, Fla., 415 F.2d 851 (5th Cir. 1969); Mpoy v. Rhee, 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014); Johnson v. Cain, 430 F. Supp. 518 (N.D. Ala. 1977).
Matters of public concern
Public school teachers do not shed their First Amendment protection in speaking on matters of public concern, but issues do not rise to the level of "public concern" by virtue of the speaker's interest in the subject matter; rather, issues achieve protected status if the words or conduct are conveyed by teachers in their roles as citizens and not in their roles as employees of a school district.
Tex.—Bates v. Dallas Independent School Dist., 952 S.W.2d 543, 121 Ed. Law Rep. 414 (Tex. App. Dallas 1997), writ denied, (Sept. 25, 1997).

3 U.S.—Cary v. Board of Ed. of Adams-Arapahoe School Dist. 28-J, Aurora, Colo., 427 F. Supp. 945 (D. Colo. 1977), judgment aff'd, 598 F.2d 535 (10th Cir. 1979).
Political contributions by teachers
The fact that pursuant to an agency shop clause of a bargaining agreement public school teachers were compelled to make, rather than prohibited from making, contributions for political purposes, worked no less an infringement of their First Amendment rights.
U.S.—Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

4 U.S.—Dean v. Timpson Independent School Dist., 486 F. Supp. 302 (E.D. Tex. 1979).

5 U.S.—Lake Park Ed. Ass'n v. Board of Ed. of Lake Park High School Dist. No. 108, Du Page County, Ill., 526 F. Supp. 710, 1 Ed. Law Rep. 791 (N.D. Ill. 1981).

6 U.S.—Mpoy v. Rhee, 758 F.3d 285, 307 Ed. Law Rep. 627 (D.C. Cir. 2014).

7 U.S.—Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981), judgment aff'd, 704 F.2d 139, 10 Ed. Law Rep. 103 (4th Cir. 1983).

8 Colo.—Board of Educ. of Jefferson County School Dist. R-1 v. Wilder, 960 P.2d 695, 128 Ed. Law Rep. 378 (Colo. 1998).

9 U.S.—Ferguson v. Thomas, 430 F.2d 852, 14 Fed. R. Serv. 2d 199 (5th Cir. 1970); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972); Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976).

10 U.S.—Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980).
No evidence of retaliation
There was no evidence that a public school teacher spoke out on a matter involving public concern, that her interest in speaking outweighed her employer's interest in efficiency, and that her speech motivated the

district's nonrenewal of her employment contract as necessary to recover on a claim of retaliation for exercise of First Amendment rights.

Tex.—Nairn v. Killeen Independent School Dist., 366 S.W.3d 229, 280 Ed. Law Rep. 1129 (Tex. App. El Paso 2012).

11 U.S.—Connecticut State Federation of Teachers v. Board of Ed. Members, 538 F.2d 471 (2d Cir. 1976).

Conduct subject to regulation

A male high school teacher's conduct of giving a document to a female student comprising a series of lewd questions emulating a standard employment application was legitimately subject to regulation under the First Amendment.

U.S.—Conward v. Cambridge School Committee, 171 F.3d 12, 133 Ed. Law Rep. 367 (1st Cir. 1999).

12 U.S.—Connecticut State Federation of Teachers v. Board of Ed. Members, 538 F.2d 471 (2d Cir. 1976).

13 U.S.—James v. Board of Ed. of Central Dist. No. 1 of Towns of Addison et al., 461 F.2d 566 (2d Cir. 1972).

Grand jury testimony

The First Amendment rights of teachers do not preclude their being called before a grand jury in connection with possible drug abuses on the campus.

N.Y.—Boikess v. Aspland, 24 N.Y.2d 136, 299 N.Y.S.2d 163, 247 N.E.2d 135 (1969).

14 U.S.—Aurora Ed. Ass'n East v. Board of Ed. of Aurora Public School Dist. No. 131 of Kane County, Illinois, 490 F.2d 431 (7th Cir. 1973).

15 U.S.—Rodriguez v. Percell, 391 F. Supp. 38 (S.D. N.Y. 1975).

16 U.S.—East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford, 562 F.2d 838 (2d Cir. 1977).

17 U.S.—Palmer v. Ticcione, 433 F. Supp. 653 (E.D. N.Y. 1977), judgment aff'd, 576 F.2d 459 (2d Cir. 1978).

18 Wash.—Millikan v. Board of Directors of Everett School Dist. No. 2, 93 Wash. 2d 522, 611 P.2d 414 (1980).

19 U.S.—Wagner v. Jones, 664 F.3d 259, 275 Ed. Law Rep. 36 (8th Cir. 2011).

20 U.S.—Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D. Iowa 1972).

As to academic freedom with regard to education matters, generally, see § 760.

21 U.S.—Dean v. Timpson Independent School Dist., 486 F. Supp. 302 (E.D. Tex. 1979).

22 Conn.—Neiman v. Yale University, 270 Conn. 244, 851 A.2d 1165, 189 Ed. Law Rep. 741 (2004).

Employment discrimination cases

First Amendment protection of academic freedom prevents courts from substituting their judgment for the judgment of a school; in other words, courts should not become "Super Tenure Review Committees" in employment discrimination cases based on the denial of tenure, but, nevertheless, deference to the judgment of academia cannot result in abdication of the judiciary's responsibility to find and redress discrimination.

Conn.—Craine v. Trinity College, 259 Conn. 625, 791 A.2d 518, 162 Ed. Law Rep. 824 (2002).

Right not expanded

The First Amendment right of academic freedom has not been expanded to protect confidential peer review materials from disclosure in a university professor's Title VII race and sex discrimination case.

U.S.—University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571, 57 Ed. Law Rep. 666, 28 Fed. R. Evid. Serv. 1169, 15 Fed. R. Serv. 3d 369 (1990).

23 Tex.—Bates v. Dallas Independent School Dist., 952 S.W.2d 543, 121 Ed. Law Rep. 414 (Tex. App. Dallas 1997), writ denied, (Sept. 25, 1997).

24 Kan.—State v. Edwards, 48 Kan. App. 2d 264, 288 P.3d 494, 286 Ed. Law Rep. 719 (2012).

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Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

2. Educational Matters

§ 762. Students

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1091, 1189, 1976 to 1981

Students in school, as well as out of school, are persons under the Constitution and are possessed of fundamental constitutional rights which the state must respect.

Students in school, as well as out of school, are persons under the Federal Constitution and are possessed of fundamental constitutional rights.[1] Moreover, First Amendment rights, applied in light of the special characteristics of the school environment, are available to students.[2] Broadly stated, students have the same rights and enjoy the same privileges as adults[3] and do not shed them when they enter school grounds,[4] and such rights may not be interfered with in the absence of a foreseeable material disruption in the orderly functioning of the classroom.[5]

The First Amendment rights of students are not necessarily coextensive with those of adults,[6] however, and the First Amendment does not give individual students the right to openly disrupt the educational process in order to press their grievances.[7] The exercise of First Amendment rights may be circumscribed by reasonable rules and regulations necessary to the orderly administration of the school system.[8] Students must exercise their First Amendment rights without materially and substantially

interfering with the requirement of appropriate discipline in the operation of the school[9] and without colliding with the rights of others.[10] When First Amendment concerns are involved, some deference must be accorded to school officials' decisions regarding the safety and education of students.[11] However, the Fourteenth Amendment protects the First Amendment rights of students against unreasonable rules and regulations,[12] and the authority of school officials to regulate students' exercise of constitutional rights cannot be used to deprive students of their rights altogether.[13] Where the exercise of First Amendment rights is affected, a regulation must be closely scrutinized to insure that the proscription against such rights is as narrow as possible.[14] School officials may prohibit student speech and expression under the First Amendment upon showing facts which might reasonably have led school authorities to forecast that the proscribed speech would cause substantial disruption of or material interference with school activities; however, school officials must be able to show that their actions were caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[15] In this regard, the right to pay residency tuition at a state university is not a fundamental right so as to be tested against a compelling state interest,[16] and the right to free school bus transportation does not involve a fundamental right.[17] Furthermore, while some courts have found that a student has no constitutional right to play interscholastic sports,[18] it has been considered that a student's right to participate in extracurricular activities, although not a fundamental right, is clearly subject to constitutional protection.[19]

In the light of the foregoing principles, various particular statutes, regulations, or actions of school authorities relating to students are violative of their constitutional rights, such as a university's refusal to register a student organization concerned with homosexual rights on the same terms and conditions as those applied to other student organizations.[20] On the other hand, various particular statutes, regulations, or actions of school authorities relating to students do not violate their constitutional rights, such as a public high school student's suspension for an unwillingness to stop wearing a Confederate flag patch;[21] the imposition of mandatory fees on students to support a newspaper, a student association, or a speaker's program;[22] and an antihazing statute that criminalizes acts causing serious bodily injury to a student.[23]

Personal appearance.

The right of a student to wear his or her hair in the manner and length he or she desires is a right which is substantial and fundamental[24] and is entitled to the protection of the First Amendment.[25] In order to limit or curtail the right, the State has a substantial burden of justification.[26] The adoption of a particular hair style is not an absolute right,[27] however, and some authorities have declared that there is no constitutional right to a particular hair style in a public elementary school.[28]

Sexual relationship between student and teacher.

The sexual relationship between a teacher and a student at the same school is not a relationship that warrants protection as a fundamental right; therefore, a rational basis test must be used to decide the constitutionality of a statute making such conduct a crime. Under such a test, the government has a legitimate interest in promoting the preservation of a safe school environment for students by preventing their sexual exploitation, and to preserve the trust that parents and the public have with teachers, who are in the unique position to groom or coerce students into exploitative or abusive conduct.[29]

Footnotes

1 U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).
Cal.—Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1st Dist. 1969).

Idaho—Murphy v. Pocatello School Dist. No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

2 U.S.—Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).

Cal.—Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1st Dist. 1969).

N.Y.—Civil Service Emp. Ass'n v. State University of Stony Brook, 82 Misc. 2d 334, 368 N.Y.S.2d 927 (Sup 1974).

Vt.—Petitions of Davenport, 129 Vt. 546, 283 A.2d 452 (1971).

Broad constitutional protection

Minn.—Tatro v. University of Minnesota, 800 N.W.2d 811, 269 Ed. Law Rep. 829 (Minn. Ct. App. 2011), aff'd on other grounds, 816 N.W.2d 509, 281 Ed. Law Rep. 1224 (Minn. 2012).

3 U.S.—Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).

4 U.S.—Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 220 Ed. Law Rep. 50 (2007); Bradford v. Norwich City School Dist., 2014 WL 4715638 (N.D. N.Y. 2014); Gold v. Wilson County School Bd. of Educ., 632 F. Supp. 2d 771, 248 Ed. Law Rep. 190 (M.D. Tenn. 2009).

Ariz.—In re Nickolas S., 226 Ariz. 182, 245 P.3d 446, 263 Ed. Law Rep. 419 (2011).

N.Y.—Saad-El-Din v. Steiner, 101 A.D.3d 73, 953 N.Y.S.2d 326, 285 Ed. Law Rep. 942 (3d Dep't 2012), appeal dismissed, 20 N.Y.3d 1032, 960 N.Y.S.2d 346, 984 N.E.2d 321 (2013).

Mont.—Griffith v. Butte School Dist. No. 1, 2010 MT 246, 358 Mont. 193, 244 P.3d 321, 262 Ed. Law Rep. 1019 (2010).

Tex.—In re D.H., 306 S.W.3d 955, 256 Ed. Law Rep. 455 (Tex. App. Austin 2010).

Residence in university dormitory

U.S.—American Future Systems, Inc. v. Pennsylvania State University, 688 F.2d 907, 6 Ed. Law Rep. 888 (3d Cir. 1982).

Maintenance of constitutional rights

Students maintain their constitutional rights in their relationship with the university.

U.S.—Gardenhire v. Chalmers, 326 F. Supp. 1200 (D. Kan. 1971).

5 U.S.—Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Cal. 1976).

6 U.S.—Cuff ex rel. B.C. v. Valley Cent. School Dist., 677 F.3d 109, 279 Ed. Law Rep. 18 (2d Cir. 2012); Kowalski v. Berkeley County Schools, 652 F.3d 565, 271 Ed. Law Rep. 707 (4th Cir. 2011); Palmer ex rel. Palmer v. Waxahachie Independent School Dist., 579 F.3d 502, 248 Ed. Law Rep. 579 (5th Cir. 2009); Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 262 Ed. Law Rep. 53 (6th Cir. 2010).

N.Y.—Saad-El-Din v. Steiner, 101 A.D.3d 73, 953 N.Y.S.2d 326, 285 Ed. Law Rep. 942 (3d Dep't 2012), appeal dismissed, 20 N.Y.3d 1032, 960 N.Y.S.2d 346, 984 N.E.2d 321 (2013).

Tex.—In re D.H., 306 S.W.3d 955, 256 Ed. Law Rep. 455 (Tex. App. Austin 2010).

7 U.S.—Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973); Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), judgment aff'd, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

8 U.S.—Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Cal. 1976); Murakowski v. University of Delaware, 575 F. Supp. 2d 571, 238 Ed. Law Rep. 106 (D. Del. 2008); Guzick v. Drebus, 305 F. Supp. 472 (N.D. Ohio 1969), judgment aff'd, 431 F.2d 594 (6th Cir. 1970).

9 U.S.—Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).

10 U.S.—Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).

11 U.S.—Zamecnik v. Indian Prairie School Dist. No. 204 Bd. of Educ., 710 F. Supp. 2d 711, 260 Ed. Law Rep. 146 (N.D. Ill. 2010), aff'd, 636 F.3d 874, 266 Ed. Law Rep. 62, 84 Fed. R. Evid. Serv. 1094 (7th Cir. 2011).

Realism

Neither school authorities nor courts are required to review First Amendment issues in a vacuum or a fantasy world; rather, they must be aware of events occurring at other schools to properly protect their students and faculty.

U.S.—Smith v. Tarrant County College Dist., 670 F. Supp. 2d 534, 253 Ed. Law Rep. 389 (N.D. Tex. 2009).

Promotion of illegal drug use

A high school principal at off-campus, school-approved, activity did not violate a student's right to free speech by confiscating from him a banner bearing the phrase "BONG HITS 4 JESUS" and suspending him; the principal reasonably viewed the banner as promoting illegal drug use.

U.S.—Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 220 Ed. Law Rep. 50 (2007).

12 U.S.—Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

13 U.S.—Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Cal. 1976).

14 U.S.—Gay Students Organization of University of New Hampshire v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974), judgment modified on other grounds, 509 F.2d 652 (1st Cir. 1974).

Reasonableness as standard

Reasonableness is the standard in determining whether a student has been deprived of his or her constitutional rights.

U.S.—Jones v. Snead, 431 F.2d 1115 (8th Cir. 1970).

15 U.S.—Bell v. Itawamba County School Bd., 774 F.3d 280, 312 Ed. Law Rep. 550 (5th Cir. 2014), reh'g en banc granted, 2015 WL 1636735 (5th Cir. 2015).

16 U.S.—Kelm v. Carlson, 473 F.2d 1267, 67 Ohio Op. 2d 275 (6th Cir. 1973).

17 La.—Harrison v. Morehouse Parish School Bd., 368 So. 2d 1113 (La. Ct. App. 2d Cir. 1979).

18 U.S.—Jones v. Oklahoma Secondary School Activities Ass'n (OSSAA), 453 F. Supp. 150 (W.D. Okla. 1977).

Fla.—Florida High School Activities Ass'n, Inc. v. Bradshaw, 369 So. 2d 398 (Fla. 2d DCA 1979).

Middle-tier analysis

A private school student's claim of a state constitutional right to participate in public school sports activities is subject to a middle-tier constitutional analysis, balancing her right to participate against the public school district's interests in restricting participation to students enrolled in the public school system.

Mont.—Kaptein By and Through Kaptein v. Conrad School Dist., 281 Mont. 152, 931 P.2d 1311, 116 Ed. Law Rep. 435 (1997).

19 Mont.—Kaptein By and Through Kaptein v. Conrad School Dist., 281 Mont. 152, 931 P.2d 1311, 116 Ed. Law Rep. 435 (1997).

Not fundamental right

The right to participate in extracurricular activities is not a fundamental right for purposes of constitutional analysis.

Kan.—Robinson v. Kansas State High School Activities Ass'n, Inc., 260 Kan. 136, 917 P.2d 836, 110 Ed. Law Rep. 435 (1996).

Tex.—In re University Interscholastic League, 20 S.W.3d 690 (Tex. 2000).

20 U.S.—Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976).

21 U.S.—Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).

22 Neb.—Larson v. Board of Regents of University of Nebraska, 189 Neb. 688, 204 N.W.2d 568 (1973).

Student activity fee

If a public university decides that its students' First Amendment interests are better protected by some type of optional or refund system with respect to a student activity fee which subsidizes activities some students find objectionable, it would be free to do so, but a system of that sort is not a constitutional requirement.

U.S.—Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

23 Md.—McKenzie v. State, 131 Md. App. 124, 748 A.2d 67, 143 Ed. Law Rep. 273 (2000).

24 U.S.—Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).

25 U.S.—Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974).

Cal.—Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1st Dist. 1969).

Violation of dress and grooming code

The suspension of a student for a violation of the school dress and grooming code violated his First Amendment rights, where the student was symbolically expressing a political viewpoint by wearing his hair long and no danger of violence or other impediment of school activities occurred.

U.S.—Church v. Board of Ed. of Saline Area School Dist. of Washtenaw County, Mich., 339 F. Supp. 538 (E.D. Mich. 1972).

26 U.S.—Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974).

27 Alaska—Breese v. Smith, 501 P.2d 159 (Alaska 1972).

Claims not meriting intervention

Claims that a school district's hair length restrictions and earring prohibition for male high school students, as applied to students who had reached the age of majority, violated state constitutional rights to equal

protection, to freedom of expression, to education, and to privacy did not manifest such an affront to constitutional rights as to merit intervention by the Supreme Court.

Tex.—Barber v. Colorado Independent School Dist., 901 S.W.2d 447, 101 Ed. Law Rep. 1241, 58 A.L.R.5th 799 (Tex. 1995).

28 U.S.—Valdes v. Monroe County Bd. of Public Instruction, 325 F. Supp. 572 (S.D. Fla. 1971), aff'd, 468 F.2d 952 (5th Cir. 1972); Epperson v. Board of Trustees, Pasadena Independent School Dist., 386 F. Supp. 317 (S.D. Tex. 1974).

Merely personal choice

U.S.—Brownlee v. Bradley County, Tenn. Bd. of Ed., 311 F. Supp. 1360 (E.D. Tenn. 1970).

29 Kan.—State v. Edwards, 48 Kan. App. 2d 264, 288 P.3d 494, 286 Ed. Law Rep. 719 (2012).

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

3. Officers and Public Employees

a. In General

§ 763. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1181, 1182

An individual may not be denied or required to relinquish his or her constitutional rights as a condition of public employment.

While there is no constitutionally protected right to public employment,[1] an individual may not be denied or required to relinquish his or her constitutional rights, such as those protected by the First Amendment, as a condition of public employment.[2] Furthermore, an individual does not lose his or her constitutional rights on entering government service.[3]

The prohibition against encroaching on the constitutional rights of public employees is not absolute or unlimited,[4] however, and within certain limits, the public employer has the right to control the conduct of its employees.[5] Accordingly, the liberty of the public employee may under some circumstances be subjected to comprehensive and substantial governmental restrictions which impede activities at the very core of specifically guaranteed constitutional rights.[6] In addition, public employees may

be subjected to restrictions on the exercise of First Amendment rights beyond that which may be applied to private citizens although a restriction which impinges upon a fundamental right can be justified only by a compelling state interest.[7]

Governmental regulations and restrictions on the exercise of First Amendment freedoms by public employees should not be lightly imposed.[8] A governmental agency seeking to justify restrictions on the exercise of an employee's constitutional rights must demonstrate that the restraint rationally relates to the enhancement of the public service, that the benefit the public gains by the restriction outweighs the resulting impairment of the constitutional rights, and that no alternatives less subversive of the constitutional rights are available.[9] The government must show that a substantial legitimate interest will in fact be served and that the limit imposed on the protected activities of its employees is the least drastic restriction of constitutional rights which will accomplish the government's legitimate objective.[10]

The protection of the efficiency and integrity in the public service constitutes a sufficient government interest to permit encroachment upon the First Amendment rights of public employees.[11] Furthermore, a governmental interest in avoiding the danger of having promotions and discharges of civil service employees motivated by political ramifications rather than merit is a compelling governmental interest which justifies the encroachment upon their First Amendment rights.[12]

In regulating public employees' activities which are protected by the First Amendment, a balance is struck between the interest of the employee in exercising his or her First Amendment rights and the interest of the state, as employer, in promoting the efficiency of the public services.[13] In promoting the efficiency of the public services, the means chosen by the government must not only be rationally related to furthering a paramount or vital governmental interest but also must be closely drawn to avoid an unnecessary abridgement of First Amendment freedoms.[14] The restrictions imposed on public employees must not be broader than required to preserve the efficiency and integrity of public service.[15] In determining the validity of a rule prohibiting public employees from engaging in conduct prejudicial to good order, an analysis must be made of the character of the employment concerned and the strength of the governmental interest in regulating the conduct of the employee in the manner chosen, balancing the interest of the employee as a citizen against the government's need to control him or her as an employee.[16]

The laws regulating the activities of public employees which are protected by the First Amendment must be precise,[17] and any infringement of such rights must be carefully tailored to achieve legitimate state objectives[18] and must be so circumscribed as not, in attaining the legitimate end, to unduly infringe upon protected rights.[19] Unless the government can demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, such beliefs cannot be the sole basis for depriving him or her of continued public employment.[20] The test of the constitutionality of the invasion of a public employee's protected rights is derived from the nature of the rights involved.[21]

CUMULATIVE SUPPLEMENT

Cases:

A significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences. U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Ohio—Walton v. Montgomery County Welfare Dept., 69 Ohio St. 2d 58, 23 Ohio Op. 3d 93, 430 N.E.2d 930 (1982).

Wash.—Williams v. Seattle School Dist. No. 1, 97 Wash. 2d 215, 643 P.2d 426, 3 Ed. Law Rep. 750 (1982).

As to dismissal from public employment, see §§ 766, 767.

No fundamental right

Continued public employment is not a fundamental right guaranteed by the United States Constitution.

N.C.—Soles v. City of Raleigh Civil Service Com'n, 345 N.C. 443, 480 S.E.2d 685 (1997).

No federally protected right

A public employee who is terminated by a public employer, absent a property right in his or her employment, has no federally protected right for which he or she is entitled to a remedy simply by reason of the termination.

U.S.—Johnson v. City Council of Green Forest, Ark., 545 F. Supp. 43 (W.D. Ark. 1982).

2 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); James v. Collin County, Tex., 561 F. Supp. 2d 698 (E.D. Tex. 2007), aff'd, 535 F.3d 365 (5th Cir. 2008).

Alaska—Kenai Peninsula Borough School Dist. v. Kenai Peninsula Borough School Dist. Classified Ass'n, 590 P.2d 437 (Alaska 1979).

Conn.—Schumann v. Dianon Systems, Inc., 304 Conn. 585, 43 A.3d 111 (2012).

Mont.—Small v. McRae, 200 Mont. 497, 651 P.2d 982, 6 Ed. Law Rep. 1099 (1982).

Inquiry into beliefs and associations

U.S.—Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978).

Unreasonable restrictions

The government cannot impose unreasonable restrictions on constitutional liberties as a condition for employment.

U.S.—Santos v. Miami Region, U. S. Customs Service, 642 F.2d 21 (1st Cir. 1981).

Fair consideration of application

The plaintiff did not have a constitutional right to employment as a police officer, but he had a constitutional right not to be refused fair consideration of his application for the position as a regular officer in retaliation for his exercise of his First Amendment rights.

U.S.—Valcourt v. Hyland, 503 F. Supp. 630 (D. Mass. 1980).

Taking oaths

Neither the federal nor state governments may condition employment on taking oaths which impinge on rights guaranteed by the First and Fourteenth Amendments.

U.S.—Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

3 U.S.—City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004); Santos v. Miami Region, U. S. Customs Service, 642 F.2d 21 (1st Cir. 1981); Valentino v. Village of South Chicago Heights, 575 F.3d 664 (7th Cir. 2009); Pearson v. District of Columbia, 644 F. Supp. 2d 23 (D.D.C. 2009), aff'd, 377 Fed. Appx. 34 (D.C. Cir. 2010); McShea v. School Bd. of Collier County, 2014 I.E.R. Cas. (BNA) 171021, 2014 WL 5590816 (M.D. Fla. 2014).

N.J.—De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (Law Div. 1967).

Judges

A judge does not relinquish his or her First Amendment rights on ascending to the bench.

N.J.—In re Inquiry of Broadbelt, 146 N.J. 501, 683 A.2d 543 (1996).

Wash.—Matter of Disciplinary Proceeding Against Sanders, 135 Wash. 2d 175, 955 P.2d 369 (1998).

Support for political opponent

A deputy's off-duty wearing of a jacket indicating his support for the sheriff's political opponent fell within the scope of First and Fourteenth Amendment protection, and the application to such conduct of a department regulation prohibiting certain conduct by deputies while acting in their official capacities unconstitutionally violated his rights.

U.S.—Cerjan v. Fasula, 539 F. Supp. 1226 (N.D. Ohio 1981), aff'd, 703 F.2d 559 (6th Cir. 1982).

4 U.S.—City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004).

5 U.S.—Childers v. Dallas Police Dept., 513 F. Supp. 134 (N.D. Tex. 1981), aff'd, 669 F.2d 732 (5th Cir. 1982).

6 Colo.—Chiappe v. State Personnel Bd., 622 P.2d 527 (Colo. 1981).

Activities hazardous to fair and effective government

First Amendment rights of public employees do not prevent the government by statute from forbidding activities which are hazardous to fair and effective government.

U.S.—Bennett v. Thomson, 116 N.H. 453, 363 A.2d 187 (1976).

7 Conn.—Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978).

Restraints on speech

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment; on the other hand, a governmental employer may impose certain restraints on the speech of its employees that would be unconstitutional if applied to the general public.

U.S.—City of San Diego, Cal. v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004).

8 U.S.—Smith v. U.S., 502 F.2d 512 (5th Cir. 1974).

9 Cal.—Unruh v. City Council, 78 Cal. App. 3d 18, 143 Cal. Rptr. 870 (5th Dist. 1978).

10 U.S.—Local 2263, Intern. Ass'n of Fire Fighters AFL-CIO v. City of Tupelo, Miss., 439 F. Supp. 1224 (N.D. Miss. 1977).

11 U.S.—Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), judgment aff'd, 668 F.2d 967 (8th Cir. 1982).

Interference with public duty

If an employee's private belief interferes with the discharge of his or her public duty, First Amendment rights may be required to yield to the state's vital interest in maintaining governmental effectiveness and efficiency.

U.S.—Cerjan v. Fasula, 539 F. Supp. 1226 (N.D. Ohio 1981), aff'd, 703 F.2d 559 (6th Cir. 1982).

Fire department

An efficient fire department is a legitimate and substantial state interest warranting limitations of First Amendment freedoms of fire department employees.

U.S.—Local 2263, Intern. Ass'n of Fire Fighters AFL-CIO v. City of Tupelo, Miss., 439 F. Supp. 1224 (N.D. Miss. 1977).

12 U.S.—Gray v. City of Toledo, 323 F. Supp. 1281, 28 Ohio Misc. 141, 57 Ohio Op. 2d 239 (N.D. Ohio 1971).

As to the dismissal, reassignment, and transfer of public employees, see §§ 766, 767.

13 U.S.—Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

Me.—Pratt v. Ottum, 2000 ME 203, 761 A.2d 313 (Me. 2000).

Mich.—Pilarowski v. Brown, 76 Mich. App. 666, 257 N.W.2d 211 (1977).

W. Va.—Gooden v. Board of Appeals of West Virginia Dept. of Public Safety, 160 W. Va. 318, 234 S.E.2d 893 (1977).

Duty of court

The judicial task in determining whether a public employee has been fired in violation of his or her First Amendment rights is to strike such balance.

U.S.—Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980).

14 U.S.—Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980).

15 Ariz.—Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968).

16 U.S.—Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980).

17 Mich.—Phillips v. City of Flint, 57 Mich. App. 394, 225 N.W.2d 780 (1975).

18 U.S.—Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs of Henrico County, 649 F.2d 237 (4th Cir. 1981).

19 U.S.—Gray v. City of Toledo, 323 F. Supp. 1281, 28 Ohio Misc. 141, 57 Ohio Op. 2d 239 (N.D. Ohio 1971).

20 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

21 U.S.—Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

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Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

3. Officers and Public Employees

a. In General

§ 764. Personal appearance of public employees

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1092, 1949

Reasonable restriction may be imposed on a public officer's personal choice of appearance.

A police department regulation governing hair length and style does not violate constitutional rights.[1] Moreover, a regulation setting the length of sideburns and mustaches and prohibiting the wearing of beards and goatees by police officers is not an unreasonable restriction on such officer's personal choice of appearance.[2] A reasonable and nonarbitrary haircut regulation for members of a fire-fighting department which is rationally related to a legitimate state interest in public safety does not infringe on the constitutional right to freedom of expression.[3] However, a regulation prohibiting county employees from wearing beards, as applied to an employee of a road department, impermissibly restricts protected rights to expression and personal liberty.[4]

Uniforms.

Although a government may generally ban unauthorized use of its uniform as long as it does so in a content-neutral and generally applicable manner, where it takes the additional step of granting certain individuals the privilege to use its official symbol in an expressive manner, thereby creating a protectable First Amendment interest where none previously existed, the governing authority may not then, absent a compelling reason, deny others a similar privilege on the basis of the content of their expression.[5]

Footnotes

1 U.S.—Stradley v. Andersen, 349 F. Supp. 1120 (D. Neb. 1972), judgment aff'd, 478 F.2d 188 (8th Cir. 1973).
Mass.—Board of Selectmen of Framingham v. Civil Service Commission, 7 Mass. App. Ct. 398, 387 N.E.2d 1198 (1979).
N.J.—Akridge v. Barres, 122 N.J. Super. 476, 300 A.2d 866 (App. Div. 1973), judgment aff'd, 65 N.J. 266, 321 A.2d 230 (1974).
Or.—Burback v. Goldschmidt, 17 Or. App. 181, 521 P.2d 5 (1974).

2 N.Y.—Greenwald v. Frank, 47 A.D.2d 628, 363 N.Y.S.2d 955 (2d Dep't 1975).

3 U.S.—Yarbrough v. City of Jacksonville, 363 F. Supp. 1176 (M.D. Fla. 1973), aff'd, 504 F.2d 759 (5th Cir. 1974).

4 U.S.—Nalley v. Douglas County, 498 F. Supp. 1228 (N.D. Ga. 1980).

5 U.S.—Local 491, International Broth. of Police Officers v. Gwinnett County, GA, 510 F. Supp. 2d 1271 (N.D. Ga. 2007).

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

3. Officers and Public Employees

b. Political Activities or Affiliation

§ 765. Political activities or affiliation of public officers or employees, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1937

The right of a public officer or employee to engage in political activities is protected under the Constitution.

A public employee's rights to political expression and association are protected by the First Amendment,[1] and even practices that only potentially threaten political association are highly suspect.[2] Accordingly, a public officer or employee has a constitutionally protected right to engage in political activities, including running for public office,[3] and where his or her political activities are unrelated to his or her job responsibilities, the public officer or employee must be treated, for purposes of adjudicating his or her First Amendment rights, as a member of the general public.[4] The right to engage in political activities is not absolute,[5] however, and both the state and federal governments may place restrictions upon political activities of public employees[6] if the exercise of those rights interferes with the discharge of their public duties.[7] More specifically, the government may place restrictions upon the political activities of public employees if justified by a reasonable necessity to burden those activities to achieve a compelling public objective[8] or if necessary to foster and protect efficient and effective government.[9]

Furthermore, the government may restrict such political activities of public employees as directly threaten administrative disruption or loss of integrity,[10] and partisan political activity of classified civil service employees may be regulated.[11] Congress also has the power to bar partisan political conduct by federal employees.[12] However, any restriction imposed by the government upon its employees' political activities must be directly related to the goal of prohibiting partisan political activity, the effect of which is to interfere with the efficiency and integrity of the public service, and the regulation must be struck down as violative of the First Amendment in the absence thereof.[13]

State constitutional provisions.

The First Amendment is not violated by a state constitutional provision rendering officeholders ineligible for the legislature if his or her current term will not expire until after the legislative term to which he or she aspires begins, or providing that holders of certain offices automatically resign their positions if they become candidates for any other elective office, with specified exceptions.[14]

Payroll deductions for political activities.

A state statute banning public-employee payroll deductions for political activities is not subject to strict scrutiny, since a state is under no obligation to aid unions in their political activities, and the State's decision not to do so is not an abridgement of the unions' free speech rights since the unions remain free to engage in such speech as they see fit but without enlisting the State's support. Moreover, such a statute reasonably furthers the State's legitimate interest in distinguishing between internal governmental operations and private speech and thus is supported by a rational basis and comports with the First Amendment.[15]

CUMULATIVE SUPPLEMENT

Cases:

Government employees asserting a claim against the government for First Amendment retaliation based on political affiliation are not required to prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance, since the constitutional harm at issue consists in large part of discouraging employees from engaging in protected activities. U.S.C.A. Const.Amend. 1. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. U.S.C.A. Const.Amend. 1. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Hager v. Pike County Bd. of Educ., 286 F.3d 366, 163 Ed. Law Rep. 606 (6th Cir. 2002); Click v. Thompson, 898 F. Supp. 2d 927 (E.D. Ky. 2012).
Right of public employees to speak out on matters of public concern
U.S.—Greenwell v. Parsley, 541 F.3d 401 (6th Cir. 2008); Eiden v. McCarthy, 531 F. Supp. 2d 333 (D. Conn. 2008).

2 U.S.—Hager v. Pike County Bd. of Educ., 286 F.3d 366, 163 Ed. Law Rep. 606 (6th Cir. 2002).

Conditioning public hiring decisions

Conditioning public hiring decisions on political belief and association violates the First Amendment rights of applicants in the absence of a vital governmental interest.

U.S.—Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

3 U.S.—McCormick v. Edwards, 646 F.2d 173 (5th Cir. 1981).

As to political activities as protected by the First Amendment, generally, see § 769.

4 U.S.—Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

Mich.—Council 11, Am. Federation of State, County and Municipal Emp. (AFSCME), AFL-CIO v. Michigan Civil Service Commission, 87 Mich. App. 420, 274 N.W.2d 804 (1978), decision aff'd, 408 Mich. 385, 292 N.W.2d 442 (1980).

5 § 769.

6 U.S.—Arden v. Village of Oak Lawn, 537 F. Supp. 181 (N.D. Ill. 1982); Crespo v. U.S. Merit Systems Protection Bd., 486 F. Supp. 2d 680 (N.D. Ohio 2007), aff'd, 547 F.3d 651 (6th Cir. 2008).

Leave of absence

A restriction on a public employee's candidacy, requiring her to take a leave of absence while running for mayor, was neutral with regard to First Amendment values where not aimed at particular parties, groups, or points of view.

U.S.—Bart v. Telford, 677 F.2d 622 (7th Cir. 1982).

7 U.S.—Hager v. Pike County Bd. of Educ., 286 F.3d 366, 163 Ed. Law Rep. 606 (6th Cir. 2002).

8 U.S.—Hickman v. City of Dallas, 475 F. Supp. 137 (N.D. Tex. 1979).

9 U.S.—Hager v. Pike County Bd. of Educ., 286 F.3d 366, 163 Ed. Law Rep. 606 (6th Cir. 2002); Vincent v. Maeras, 447 F. Supp. 775 (S.D. Ill. 1978).

Seeking elective office

A city police department regulation prohibiting employees of the department from running for elective public office did not violate the First Amendment.

U.S.—Otten v. Schicker, 655 F.2d 142 (8th Cir. 1981).

10 Cal.—Unruh v. City Council, 78 Cal. App. 3d 18, 143 Cal. Rptr. 870 (5th Dist. 1978).

Governmental effectiveness and efficiency; avoidance of disruption

U.S.—Vanterpool v. Cuccinelli, 998 F. Supp. 2d 451 (E.D. Va. 2014), appeal dismissed, (4th Circ. 14-1216) (Mar. 28, 2014).

Disruptive to racing commission's effective operation of horse races

A racing steward's statements in support of a gubernatorial candidate, while on a matter of public concern, was not protected speech, as required for the steward to establish a prima facie protected-speech employment retaliation claim against the State Racing Commissioner and Deputy Commissioner; the steward's speech was plainly disruptive to the state racing commission's effective operation of horse races because the steward's statements were made on-site during work hours to individuals regulated by the commission.

U.S.—Dye v. Office of the Racing Com'n, 702 F.3d 286 (6th Cir. 2012).

Justice may be required to resign

It is not an impingement on constitutional rights to require a justice to resign his or her office when he or she becomes a candidate either in a party primary or in a general election for a nonjudicial office.

U.S.—Adams v. Supreme Court of Pennsylvania, 502 F. Supp. 1282 (M.D. Pa. 1980).

11 U.S.—Gray v. City of Toledo, 323 F. Supp. 1281, 28 Ohio Misc. 141, 57 Ohio Op. 2d 239 (N.D. Ohio 1971).

Holding political party office

A town code of ethics restricting town officers, employees, and board members from holding offices in political parties was not in contravention of such persons' constitutional rights under the First and Fourteenth Amendments.

N.Y.—Belle v. Town Bd. of Town of Onondaga, 61 A.D.2d 352, 402 N.Y.S.2d 677 (4th Dep't 1978).

12 U.S.—U. S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973).

13 U.S.—Gray v. City of Toledo, 323 F. Supp. 1281, 28 Ohio Misc. 141, 57 Ohio Op. 2d 239 (N.D. Ohio 1971).

Temporary employment

The analysis used to determine whether political affiliation may be considered in the hiring and promotion of public employees applies to temporary as well as permanent employees.

U.S.—Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994), decision aff'd, 100 F.3d 1334 (7th Cir. 1996).

Partisan political affiliation of judge

The failure to consider for appointment, or the denial of an appointment, to an individual by the governor of a state to sit as a state judge because of that individual's partisan political affiliation does not violate the individual's First Amendment rights.

U.S.—Newman v. Voinovich, 789 F. Supp. 1410 (S.D. Ohio 1992), decision aff'd, 986 F.2d 159 (6th Cir. 1993).

14 U.S.—Clements v. Fashing, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982).

15 U.S.—Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009).

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16A C.J.S. Constitutional Law § 766

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

3. Officers and Public Employees

b. Political Activities or Affiliation

§ 766. Dismissal or other adverse employment action

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1937, 1947, 1948

Generally, a public employee who is not engaged in policymaking or confidential duties may not be discharged on the sole basis of his or her political belief or affiliation with a particular political party. However, in determining whether public employees may be discharged because of their political affiliation, the ultimate question is whether party affiliation is an appropriate requirement for the effective performance of the public office involved.

Generally, a public employee may not be discharged or dismissed solely because of his or her political beliefs or affiliation with a particular political party.[1] More specifically, a public employee who is not engaged in policymaking or confidential duties and who is satisfactorily performing his or her job may not be discharged on the sole ground of his or her political belief or affiliation.[2] On the other hand, where a public employee is engaged in policymaking or confidential duties, he or she may be discharged solely on the ground of his or her political affiliation without infringing his or her constitutional rights.[3] Furthermore, even if the public employee is not a policymaker per se but is privy to discussions and information involved in the policymaking process, he or she may be discharged for purely political reasons.[4] This exception applies not only when a new political party

takes power[5] but also includes patronage dismissals when one faction of a party replaces another faction of the same party.[6] On the other hand, a public employee, who engages neither in policymaking nor confidential duties, is not constitutionally protected from being discharged for becoming actively involved in a partisan election campaign.[7]

Ultimately, though, in determining whether public employees may be discharged because of their political affiliation, the inquiry is not whether the label "policymaker" or "confidential" fits a particular position;[8] rather, the question is whether party affiliation is an appropriate requirement for the effective performance of the public office involved.[9] Thus, under the First Amendment "political-patronage doctrine," the court must first ask whether the public employee asserting that he or she was wrongfully terminated has produced sufficient evidence for a jury to find that the employee was discharged because of his or her political beliefs or affiliations, and then if this burden is met, the burden shifts to the employer to demonstrate that the terminated party's job was one for which political affiliation was an appropriate requirement.[10] A two-prong test is used in determining whether political affiliation is an appropriate requirement for a government position it must be determined (1) whether the position at issue relates to partisan political interests or concerns, and (2) whether the inherent duties of the position are such that party affiliation is an appropriate requirement.[11] In this connection, the court may consider the nature of the responsibilities of the employee; whether the employee acts as an advisor or formulates plans for the implementation of broad goals; or whether the employee, even if a supervisor, merely has responsibilities with limited and well-defined objectives.[12] If an employee's private political beliefs would interfere with the discharge of his or her public duties, his or her First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.[13]

Factors.

Factors which have been identified as relevant in determining whether an employee may, consistent with the First Amendment, be discharged on the basis of his or her political affiliation, include whether the employee: (1) is exempt from civil service protection; (2) has some technical competence or expertise; (3) controls others; (4) is authorized to speak in name of policymakers; (5) is perceived as policymaker by public; (6) influences government programs; (7) has contact with elected officials; and (8) is responsive to partisan politics and political leaders.[14]

CUMULATIVE SUPPLEMENT

Cases:

In determining whether public employee's position was such that political affiliation could be considered a job qualification, in determining whether a public official is entitled to qualified immunity in § 1983 claim of political affiliation discrimination in violation of the First Amendment, the court begins with an inspection of the functions of the position in question; it examines the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement, and also looks to secondary factors such as relative pay, title, and legal or legislative classification to further inform the analysis. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Lopez-Erquicia v. Weyne-Roig, 846 F.3d 480 (1st Cir. 2017).

A government official does not violate a public employee's First Amendment rights when the employee is dismissed for political association if the employee holds a policymaking position. U.S. Const. Amend. 1. McCaffrey v. Chapman, 921 F.3d 159 (4th Cir. 2019).

Deputy sheriff held policymaking position with county, and thus sheriff could decline to reappoint him for supporting sheriff's political opponent without violating his First Amendment right to political association; sheriff had duty to carry out policies

voters approved in the election, and deputy engaged in law enforcement functions on behalf of sheriff and acted as lead investigator on high-profile crimes. U.S. Const. Amend. 1. McCaffrey v. Chapman, 921 F.3d 159 (4th Cir. 2019).

Position of county financial resources director fell within *Elrod-Branti*policymaking exception to First Amendment's general prohibition on termination of government employees because of their political affiliation; position required trust and confidence of elected county board members, and entailed substantial policymaking authority. U.S. Const. Amend. 1. Bogart v. Vermilion County, Illinois, 909 F.3d 210 (7th Cir. 2018).

Employee, who worked in municipal government, sufficiently alleged that he was terminated because of his political beliefs, so as to state prima facie case of political discrimination in violation of First Amendment, in action against mayor, director of human resources, officer of municipal government, and related parties; employee stated he was active supporter of New Progressive Party and that defendants were members of opposing Popular Democratic Party, and employee alleged that his political affiliation was well known to defendants, that he was told that he could not engage in political activities for New Progressive Party but could only participate in activities of Popular Democratic Party, and that mayor gave order to dismiss employee for participation with New Progressive Party. U.S. Const. Amend. 1. Irizarry-Robles v. Rodriguez, 233 F. Supp. 3d 296 (D.P.R. 2017).

Former employee of Puerto Rico Department of Correction and Rehabilitation(DCR) failed to establish that DCR secretary knew his political affiliation as required to establish prima facie § 1983 First Amendment political discrimination claim against secretary, alleging that he was terminated because of his political affiliation; employee had never met the secretary and they never discussed each other's political affiliations. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Cano-Rodriguez v. De Jesus-Cardona, 261 F. Supp. 3d 284 (D.P.R. 2016).

Executive at government-owned workers' compensation insurance corporation sufficiently alleged that corporation's regional director and administrator were aware of his political party affiliation, and were members of a rival political party, so as to support § 1983 claim for political discrimination in violation of the First Amendment, alleging that director falsely accused him of skipping work to participate in political activities, excluded him from staff meetings, and denied his request for five months leave in an effort to thwart his primary campaign; executive alleged director chided him for missing work to participate in a political event, and that administrator became aware of his party affiliation when a non-party appealed to her to override director's denial of executive's vacation request. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Aviles v. Figueroa, 195 F. Supp. 3d 435 (D.P.R. 2016).

Even assuming that fire chief's termination was politically motivated, such firing was not improper under the First Amendment, since chief's position involved a degree of discretionary authority that rendered him a policymaker within meaning of exception to prohibition on patronage dismissals, given that state law and county description of his duties conferred upon him the power to oversee daily operation of the fire department, supervise all its employees, purchase department materials, develop and implement policy, and devise department budget. U.S. Const. Amend. 1; Tenn. Code Ann. § 5-17-103. Smallwood v. Cocke County Government, 290 F. Supp. 3d 755 (E.D. Tenn. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); Hunt v. County of Orange, 672 F.3d 606 (9th Cir. 2012).
N.J.—Dyke v. Otlowski, 154 N.J. Super. 377, 381 A.2d 413 (Ch. Div. 1977).

2 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).
Ky.—Thompson v. Huecker, 559 S.W.2d 488 (Ky. Ct. App. 1977).

N.J.—Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 (1981).

Branch managers of department of revenue

State department of revenue branch managers could not be discharged because of their political affiliation upon a change in administrations in view of the fact that the position of branch office manager was not one for which political affiliation was an appropriate requirement.

U.S.—Gibbons v. Bond, 668 F.2d 967 (8th Cir. 1982).

Dismissal of attorney

Where the testimony of a Republican commissioner, the actual policymaker for a county department, that he would have "better rapport" with a Republican as an attorney for the department, was insufficient to justify the dismissal of a Democrat from such position, and where the commissioner could not point to any category of job performance that a Republican attorney could perform better than a Democrat, the plaintiff was dismissed as an attorney for the department solely on grounds of his political affiliation and in violation of his constitutional rights.

U.S.—Layden v. Costello, 517 F. Supp. 860 (N.D. N.Y. 1981).

3 U.S.—Wilson v. Moreau, 492 F.3d 50 (1st Cir. 2007); Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979); Hunt v. County of Orange, 672 F.3d 606 (9th Cir. 2012).

Insufficient trust and confidence on basis of disagreement

U.S.—Maymi v. Puerto Rico Ports Authority, 515 F.3d 20 (1st Cir. 2008).

Retaliatory harassment

The policymaker exception to the ban on patronage dismissals does not exempt from First Amendment scrutiny a campaign of retaliatory harassment.

U.S.—Wallace v. Benware, 67 F.3d 655 (7th Cir. 1995).

Nontenured government attorneys

Nontenured government attorneys, whose broad public responsibilities are confidential in nature and involve formulating or implementing policy relating to political beliefs, may be discharged when the effective performance of their duties is compromised because of a difference in political commitment.

N.J.—Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 (1981).

4 R.I.—Montaquila v. St. Cyr, 433 A.2d 206 (R.I. 1981).

Rendition of legal advice

So long as applicable statutes, regulations, and case law contemplate that a public officer might be relied upon to render legal advice implementing policy, such official is not protected by the case law prohibition against firing for political reasons.

U.S.—Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa. 1982), judgment aff'd, 687 F.2d 9 (3d Cir. 1982).

5 U.S.—Embry v. City of Calumet City, Ill., 701 F.3d 231 (7th Cir. 2012).

New government in power

A new government in power can replace employees in policymaking positions without violating the First Amendment.

U.S.—Sanchez-Lopez v. Fuentes-Pujols, 375 F.3d 121, 12 A.L.R. Fed. 2d 927 (1st Cir. 2004).

6 U.S.—Embry v. City of Calumet City, Ill., 701 F.3d 231 (7th Cir. 2012).

7 U.S.—McCormick v. Edwards, 646 F.2d 173 (5th Cir. 1981).

County clerk

A county clerk's discharge of the deputy county clerk when the deputy became a candidate for the clerk's position did not violate the deputy clerk's First Amendment rights.

U.S.—Carver v. Dennis, 886 F. Supp. 636 (M.D. Tenn. 1995), judgment aff'd, 104 F.3d 847, 1997 FED App. 0018P (6th Cir. 1997).

8 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa. 1982), judgment aff'd, 687 F.2d 9 (3d Cir. 1982); Moorhead v. Government of Virgin Islands, 19 V.I. 65, 542 F. Supp. 213 (D.V.I. 1982).

9 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980); Moorhead v. Government of Virgin Islands, 19 V.I. 65, 542 F. Supp. 213 (D.V.I. 1982).

Analysis applies to temporary employees

U.S.—Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994), decision aff'd, 100 F.3d 1334 (7th Cir. 1996).

Assistant district attorney

The office of assistant district attorney was within the policymaking exception to the rule; that the assistant district attorney could conceivably operate in a purely technical and ministerial manner or that a particular assistant district attorney in fact so limited himself was irrelevant.

U.S.—Mummau v. Ranck, 687 F.2d 9 (3d Cir. 1982).

City legal officers

As matter of law, the positions of city solicitor and assistant city solicitor were one for which party affiliation was an appropriate requirement for effective performance; therefore, dismissal of those attorneys for reasons of their political affiliation did not violate the First Amendment.

U.S.—Ness v. Marshall, 660 F.2d 517 (3d Cir. 1981).

10 U.S.—Dye v. Office of the Racing Com'n, 702 F.3d 286 (6th Cir. 2012).

11 U.S.—Ortiz Pinero v. Rivera Acevedo, 900 F. Supp. 574 (D.P.R. 1995), judgment aff'd, 84 F.3d 7 (1st Cir. 1996).

Expanded version of test

Under the two-pronged test to determine whether a particular public employee can be properly terminated on account of political-party affiliation, in employee's claim that her First Amendment freedom of association rights were violated, the court first looks to whether the discharging agency's functions entail decision-making on issues where there is room for political disagreement on goals or their implementation, and then determines whether the particular responsibilities of the plaintiff's position resemble those of a policy maker, privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement for continued tenure.

U.S.—O'Connell v. Marrero-Recio, 724 F.3d 117 (1st Cir. 2013).

12 U.S.—Rosenberg v. Redevelopment Authority of City of Philadelphia, 428 F. Supp. 498 (E.D. Pa. 1977).

Function of employee not considered

The relevant inquiry in determining whether a public employee may be terminated for his or her political affiliation without offending the First Amendment focuses on the function of the public office involved, not the function of the particular employee occupying the office.

U.S.—Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa. 1982), judgment aff'd, 687 F.2d 9 (3d Cir. 1982).

13 U.S.—Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), judgment aff'd, 668 F.2d 967 (8th Cir. 1982); Layden v. Costello, 517 F. Supp. 860 (N.D. N.Y. 1981).

14 U.S.—Almonte v. City of Long Beach, 478 F.3d 100 (2d Cir. 2007).

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16A C.J.S. Constitutional Law § 767

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§ 767. Dismissal or other adverse employment action —To suppress exercise of constitutional rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1937, 1941 to 1943, 1945 to 1948

In order to successfully challenge a discharge from public employment on First Amendment grounds, the burden of proof is on the employee to establish that the suppression of a constitutionally protected right has been a substantial or motivating factor in the decision to terminate his or her employment, whereupon the burden shifts to the employer, who may avoid liability by showing by a preponderance of the evidence that the same decision would have been made in the absence of a constitutionally protected conduct.

In order to successfully challenge a discharge from public employment on First Amendment grounds, the burden of proof is on the employee to establish that the suppression of a constitutionally protected right has been a substantial or motivating factor in the decision to terminate his or her employment.[1] The burden then shifts to the employer, who may avoid liability by showing by a preponderance of the evidence that the same decision would have been made in the absence of a constitutionally protected conduct.[2] The test applied to First Amendment retaliation claims by government employees has five elements and considers whether: (1) the speech was made pursuant to an employee's official duties, (2) the speech was on a matter of public concern,

(3) the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests, (4) the protected speech was a motivating factor in the adverse employment action, and (5) the defendant would have reached the same employment decision in the absence of the protected conduct.[3] The first three prongs of the five-part test are matters of law to be decided by the court.[4] In determining whether a public employee's speech was on a matter of public concern in a First Amendment retaliation action, courts must avoid rigid multipart tests that would shoehorn communication into ill-fitting categories and should instead rely on a generalized analysis of the nature of the speech; the essential question is whether the speech addressed matters of public as opposed to personal interest, and courts commonly examine the content, form, and context of a given statement as revealed by the whole record.[5] In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.[6]

An independent justification coupled with a constitutionally flawed reason may not taint a decision to terminate employment.[7] An employee who would have been fired regardless of whether he or she has exercised constitutional rights should not be reinstated, therefore, solely because of his or her exercise of those rights.[8]

Independent contractors.

The protections generally afforded to public employees against being discharged for refusing to support a political party or its candidates, or for otherwise exercising First Amendment rights, also extend to independent contractors.[9] Accordingly, the First Amendment protects independent contractors from termination or the prevention of the automatic renewal of at-will government contracts in retaliation for their exercise of free speech.[10]

CUMULATIVE SUPPLEMENT

Cases:

First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. U.S.C.A. Const.Amend. 1. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

Exceptions to the general rule that the First Amendment prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity take account of practical realities, such as the need for efficiency and effectiveness in government service. U.S.C.A. Const.Amend. 1. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

Protected speech and activity were not substantial or motivating factor for termination of market conduct examiner, as public employee, and therefore termination of his public employment could not be retaliatory under First Amendment; although employee engaged in speech and activity in mustering collective will of his co-workers and Michigan Department of Insurance and Financial Services (MDIFS) in attempt to thwart inclusion of intra-family exclusion clauses (IFEs) in insurance policies in what he believed to be unfair insurer practice, adverse action was taken by employer because of concerns about and breaches of employee's confidentiality obligations and violations of MDIFS policy. U.S. Const. Amend. 1. Haddad v. Gregg, 910 F.3d 237 (6th Cir. 2018).

When suspicious timing alone is insufficient to carry a public employee's burden to demonstrate that the employee's protected expressive conduct was a motivating factor in the adverse employment action, as required to support employee's First

Amendment retaliation claim, the employee may survive summary judgment if there is other evidence that supports the inference of a causal link. U.S. Const. Amend. 1; Fed. R. Civ. P. 56(a). Daza v. Indiana, 941 F.3d 303 (7th Cir. 2019).

Contractor's letter to city's common council accusing its former employee and city administrator of unauthorized access of its e-mails and improperly divulging its confidential information dealt with contract administration, and thus was not protected by First Amendment, even though letter was not required by contract, where letter's stated purpose was to give council relevant information before voting whether to terminate contract. U.S. Const. Amend. 1. Comsys, Inc. v. Pacetti, 893 F.3d 468 (7th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982).
Ala.—Holliyan v. Gayle, 404 So. 2d 31 (Ala. 1981).
S.C.—Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).
Failure to allege political motive for conduct
U.S.—Otero v. Commonwealth of Puerto Rico Indus. Com'n, 441 F.3d 18 (1st Cir. 2006).
More than awareness required
A plausible discrimination claim under the First Amendment requires more than an awareness of the public employee's political affiliations; it requires a reasonable inference that the plaintiffs' political affiliation was a substantial or motivating factor in the defendants' conduct.
U.S.—Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1 (1st Cir. 2011).
Temporal proximity
While mere temporal proximity between a change of administration and an adverse employment action is insufficient to establish discriminatory animus in a public employee's political discrimination action, it is relevant to whether political affiliation was a substantial or motivating factor in that adverse employment decision; also probative of discriminatory animus is a politically charged employment atmosphere occasioned by a major political shift coupled with the fact that plaintiffs and defendants are of competing political persuasions.
U.S.—Torres-Santiago v. Municipality of Adjuntas, 693 F.3d 230 (1st Cir. 2012).

2 U.S.—Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982).
S.C.—Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).
Showing it would have reached same decision
When a public employee shows that protected conduct was a motivating factor in an adverse employment decision, the employer still prevails on a First Amendment political discrimination claim by showing that it would have reached the same decision in the absence of the protected conduct.
U.S.—Sanchez-Lopez v. Fuentes-Pujols, 375 F.3d 121, 12 A.L.R. Fed. 2d 927 (1st Cir. 2004).

3 U.S.—Seifert v. Unified Government of Wyandotte County/Kansas City, 779 F.3d 1141 (10th Cir. 2015); Madden v. Regional University System, of Oklahoma, 2014 I.E.R. Cas. (BNA) 173694, 2014 WL 7365932 (W.D. Okla. 2014).

4 U.S.—Madden v. Regional University System, of Oklahoma, 2014 I.E.R. Cas. (BNA) 173694, 2014 WL 7365932 (W.D. Okla. 2014).

5 U.S.—Oyarzo v. Tuolumne Fire Dist., 955 F. Supp. 2d 1038 (E.D. Cal. 2013).

6 U.S.—Garcia v. Newtown Tp., 819 F. Supp. 2d 416 (E.D. Pa. 2011), aff'd, 483 Fed. Appx. 697 (3d Cir. 2012).

7 U.S.—Farkas v. Thornburgh, 493 F. Supp. 1168 (E.D. Pa. 1980), aff'd, 633 F.2d 209 (3d Cir. 1980) and aff'd, 642 F.2d 441 (3d Cir. 1981).

8 U.S.—Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982).

9 U.S.—O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996).

10 U.S.—Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

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IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

3. Officers and Public Employees

b. Political Activities or Affiliation

§ 768. Dismissal or other adverse employment action—Adverse actions short of actual discharge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1937, 1941 to 1943, 1945, 1946

Employment actions short of outright dismissal or demotion, such as transfers, may have a chilling effect on an employee's exercise of First Amendment rights if they are sufficiently punitive to deter speech, and this standard is met when such actions result in conditions unreasonably inferior to the norm for that position.

The general principle with regard to public employment dismissals must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissals.[1] Promotions, transfers, and recalls after layoffs based on political affiliation or support are likewise an impermissible infringement on the First Amendment rights of public employees.[2] Furthermore, it is not necessary that an employment decision based on patronage be the "substantial equivalent of a dismissal" for the decision to violate low-level public employee's rights under the First Amendment; this test is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.[3] In applying the principle to the actual or threatened reassignment or transfer of a government employee, the issue is whether the specific reassignment or transfer does in fact impose

upon the employee a choice between resignation and the surrender of protected rights so as to be tantamount to an outright dismissal.[4] It has also been said that employment actions short of outright dismissal or demotion, such as transfers, may have a chilling effect on an employee's exercise of First Amendment rights if they are sufficiently punitive to deter speech, and this standard is met when such actions result in conditions unreasonably inferior to the norm for that position.[5]

CUMULATIVE SUPPLEMENT

Statutes:

45 C.F.R. § 131(b) was removed effective October 6, 2017. As to religious exemptions in connection with coverage of certain preventive health services, see 45 C.F.R. § 132; as to moral exemptions in connection with coverage of certain preventive health services.

Cases:

When the government demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and § 1983, even if the government makes a factual mistake about the employee's behavior. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983. Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016).

Federal agencies' regulatory scheme for accommodating religious non-profit organizations' objections to Affordable Care Act's (ACA) contraception mandate, which shifted legal responsibility for providing contraception coverage for organizations' employees from organizations to their third party administrators once organizations provided government with notice of their objections, rationally served government's twin interests of facilitating religious exercise and filling coverage gaps resulting from accommodating that religious exercise, and thus did not violate organizations' rights under Free Exercise Clause, despite organizations' contention that administrative tasks required to opt out of mandate made them complicit in overall scheme that resulted in their employees being afforded contraception coverage to which they had religious objections. U.S.C.A. Const.Amend. 1; Patient Protection and Affordable Care Act, § 1001(a)(4), 42 U.S.C.A. § 300gg–13(a)(4); 45 C.F.R. § 147.131(c)(2). Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Delong v. U.S., 621 F.2d 618 (4th Cir. 1980).
Failure to reappoint
A public employee may establish a claim to reinstatement if the decision not to renew his or her appointment was made by reason of his or her exercise of constitutionally protected First Amendment freedoms.
Kan.—Kennedy v. Board of County Com'rs of Shawnee County, 264 Kan. 776, 958 P.2d 637 (1998).

2 U.S.—Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).
Application to temporary employees
The analysis used to determine whether political affiliation may be considered in the transfer, recall, and dismissal of public employees applies to both temporary and permanent employees.
U.S.—Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994), decision aff'd, 100 F.3d 1334 (7th Cir. 1996).
Causation

A deputy sheriff's allegations that a sheriff twice told a deputy that the political action committee (PAC) which the deputy chaired ought to support his reelection bid, that the sheriff threatened to transfer the deputy to jail duty if the PAC did not support his candidacy, and that the sheriff transferred the deputy three weeks after the PAC declined to endorse the sheriff were sufficient to allow a plausible inference that the sheriff knew of the nonendorsement before he initiated the transfer and that the nonendorsement caused the jail-duty transfer, as required to establish the deputy's claim against the sheriff for retaliating against him for the exercise of his free speech and association rights, in violation of the First Amendment.

U.S.—Burnside v. Kaelin, 773 F.3d 624 (5th Cir. 2014).

3 U.S.—Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

4 U.S.—Delong v. U.S., 621 F.2d 618 (4th Cir. 1980).

5 U.S.—Camacho-Morales v. Caldero, 2014 I.E.R. Cas. (BNA) 173544, 2014 WL 7252090 (D.P.R. 2014).

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IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

4. Political Activities

§ 769. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1680, 1681, 1686 to 1688

A.L.R. Library

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 A.L.R.4th 702

The right to engage in political activity as a form of political expression is protected by the First Amendment, and this includes the right to run for a public office.

The right to engage in political activity as a form of political expression is protected by the First Amendment[1] and has been characterized as a fundamental right.[2] Moreover, the right to run for a public office is a right protected by the First Amendment[3]

and is also a fundamental interest or right according to some,[4] but not all, authorities.[5] Any law which significantly infringes such right is subject to strict review.[6]

At any rate, the right to run for a public office or to participate in political activities is not absolute[7] and may be restricted or regulated by the State.[8] Even a significant interference with such a right may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of the right.[9]

In order to justify any restrictions upon political freedom, the purpose of the law must be to protect a substantial governmental interest.[10] As more completely stated, the rule is that in order to justify regulation of political activity under First Amendment's strict scrutiny test, a state must demonstrate: (1) the existence of a compelling governmental interest, (2) that the challenged provision is necessary to advance that interest, and (3) that the provision is narrowly tailored to do so, with a provision being considered to be narrowly tailored if it burdens only that amount of speech necessary to serve the compelling governmental interest.[11] Furthermore, while Congress may choose not to offer any incentives or assistance to new parties or independent candidates, it may not act to create disincentives for the purpose of protecting the major political parties.[12] A political party's choice among various ways of determining the makeup of a state's delegation to a party's national convention is protected by the Constitution, and the courts may not interfere on the ground that they view a particular expression of First Amendment freedoms as unwise or irrational.[13] The First Amendment does not require that a political party, with a majority of registered voters, has the right to elect all members of a multimember body.[14] Furthermore, citizens have a constitutional right to create and develop new political parties, derived from the First and Fourteenth Amendments.[15]

Restrictions permitted upon the electoral process are not unlimited since they must serve some compelling state interest.[16] In resolving constitutional challenges to specific provisions of election laws, the court must consider the character and magnitude of the asserted injury to First Amendment rights and identify and evaluate the precise interests set forth by the state in justification; furthermore, in passing judgment, the court must not only determine the legitimacy and strength of each of those interests but must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.[17]

Public criticism.

The Constitution protects only the right to run for office in the sense of getting on the ballot, and there is no constitutional right to run for office without public criticism of the candidate.[18]

Footnotes

1 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
Mont.—Gehring v. All Members of State 1993 Legislature, 269 Mont. 373, 889 P.2d 1164 (1995).
N.J.—Application of Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976).
R.I.—Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 (1977).
Political activities of public officers and employees, see § 765.
Political expression
The role that elected officials play in society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.
U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
Political parties enjoy constitutional protection

The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas; as a result, political parties' government, structure, and activities enjoy constitutional protection.

U.S.—Timmons v. Twin Cities Area New Party, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

2 Ariz.—Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968).

3 U.S.—Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973).

Minn.—Bolin v. State, Dept. of Public Safety, 313 N.W.2d 381 (Minn. 1981).

R.I.—Cummings v. Godin, 119 R.I. 325, 377 A.2d 1071 (1977).

4 U.S.—Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973).

5 Ky.—Cook v. Popplewell, 394 S.W.3d 323 (Ky. 2011).

Minn.—Bolin v. State, Dept. of Public Safety, 313 N.W.2d 381 (Minn. 1981).

Tex.—State v. Hodges, 92 S.W.3d 489 (Tex. 2002).

Right to run for elective office is not fundamental right

Neb.—Pick v. Nelson, 247 Neb. 487, 528 N.W.2d 309 (1995).

6 U.S.—Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973).

Tex.—State v. Hodges, 92 S.W.3d 489 (Tex. 2002).

7 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

Ill.—Hoskins v. Walker, 57 Ill. 2d 503, 315 N.E.2d 25 (1974).

Minn.—Bolin v. State, Dept. of Public Safety, 313 N.W.2d 381 (Minn. 1981).

8 U.S.—Russell v. Grimes, 2014 WL 5166722 (E.D. Ky. 2014).

Minn.—In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer, 688 N.W.2d 854 (Minn. 2004).

Tex.—United Farm Workers Organizing Committee, AFL-CIO v. La Casita Farms, Inc., 439 S.W.2d 398 (Tex. Civ. App. San Antonio 1968), writ refused n.r.e., (July 16, 1969).

9 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

10 Or.—Ivancie v. Thornton, 250 Or. 550, 443 P.2d 612 (1968).

Compelling interest

The government may restrict the speech of political candidates only when it can clearly advance a compelling reason for the restriction; avoiding substantive confusion among the voters regarding political issues simply does not present such a compelling interest.

Me.—Mowles v. Commission on Governmental Ethics and Election Practices, 2008 ME 160, 958 A.2d 897, 51 A.L.R.6th 705 (Me. 2008).

Residency requirement

A provision of a city charter containing a residency requirement for election to the city council did not serve a compelling governmental interest for the purpose of determining whether such requirements passed the First Amendment test.

W. Va.—Marra v. Zink, 163 W. Va. 400, 256 S.E.2d 581 (1979).

11 U.S.—Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Begin, 431 F. Supp. 2d 227 (D.R.I. 2006).

12 U.S.—Greenberg v. Bolger, 497 F. Supp. 756 (E.D. N.Y. 1980).

13 U.S.—Democratic Party of U. S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981).

14 U.S.—Hechinger v. Martin, 411 F. Supp. 650 (D.D.C. 1976), judgment aff'd, 429 U.S. 1030, 97 S. Ct. 721, 50 L. Ed. 2d 742 (1977).

15 U.S.—Norman v. Reed, 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

16 U.S.—Georges v. Carney, 546 F. Supp. 469 (N.D. Ill. 1982), judgment aff'd, 691 F.2d 297 (7th Cir. 1982).

17 U.S.—Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

18 U.S.—Edwards v. Reynaud, 463 F. Supp. 1235 (E.D. La. 1979).

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4. Political Activities

§ 770. Ballot access

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1686, 1693

In ballot access cases, the inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.

The right to reasonable access to the ballot derives from the First Amendment.[1] In ballot access cases, the inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.[2] According to some authority, the ultimate test of whether statutory ballot access restrictions are unduly burdensome of First Amendment rights to ballot access is whether the particular election laws under attack, when considered in connection with other related election laws, unduly encourages the maintenance of the political status quo or are oppressive to a degree that stifles the exercise of First Amendment rights.[3] In ballot access cases, the State must show a compelling interest in order to justify infringements of the right to vote.[4]

CUMULATIVE SUPPLEMENT

Cases:

Kentucky had important interest in ensuring that political candidates demonstrate significant modicum of support before gaining access to ballot, primarily in order to avoid voter confusion, ballot overcrowding, and frivolous candidacies, as required for state's ballot-access laws to survive two "third-party" political associations' First and Fourteenth Amendment challenge to blanket-access requirement that associations gain two percent of votes in presidential election. U.S. Const. art. 1, § 4, cl.1; U.S. Const. Amends. 1, 14; Ky. Rev. Stat. Ann. § 118.015. Libertarian Party of Kentucky v. Grimes, 835 F.3d 570 (6th Cir. 2016).

To trigger strict scrutiny on constitutional challenge to state ballot access law, challenger must first show that they seriously restrict the availability of political opportunity; this is because the evidence that the burden is severe, de minimis, or something in between, sets the stage for the analysis by determining how compelling the state's interest must be to justify the law in question. De La Fuente v. Padilla, 930 F.3d 1101 (9th Cir. 2019).

District court's determination that there was insufficient evidence from which to measure the burdens on discrete subgroups of voters, which was a threshold requirement to conducting a subgroup analysis concerning state's criminal statute prohibiting third parties from collecting early ballots from voters, was not clearly erroneous, for purposes of first prong for three-prong *Anderson-Burdick* balancing test for a challenge to a state election law under the First and Fourteenth Amendments; political party's witnesses could not specify how many voters who used ballot collection services under previous law would have been unable to vote without ballot collection services. U.S. Const. Amends. 1, 14; Ariz. Rev. Stat. Ann. §§ 16-542(D), 16-1005(H, I). Democratic National Committee v. Reagan, 904 F.3d 686 (9th Cir. 2018).

When the Supreme Judicial Court evaluates the constitutionality of a restriction on access to the ballot, it applies a sliding scale approach, through which it weighs the character and magnitude of the burden the State's rule imposes on the plaintiffs' rights against the interests the State contends justify that burden, and considers the extent to which the State's concerns make the burden necessary. Mass. Const. pt. 1, art. 9. Goldstein v. Secretary of Commonwealth, 484 Mass. 516, 142 N.E.3d 560 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Wright v. Mahan, 478 F. Supp. 468 (E.D. Va. 1979), aff'd, 620 F.2d 296 (4th Cir. 1980).

Denial of access implicates substantial constitutional rights

(1) Ballot-access restrictions implicate substantial voting, associational, and expressive rights protected by the First and Fourteenth Amendments.

U.S.—Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014).

(2) The denial of a candidate's access to the ballot implicates important constitutional rights that are central to the preservation of democracy: the right to vote and the right to associate in pursuit of common political ends.

Minn.—In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer, 688 N.W.2d 854 (Minn. 2004).

Restriction of speech

(1) A regulation imposes a severe speech restriction if it significantly impairs access to the ballot.

U.S.—Chamness v. Bowen, 722 F.3d 1110 (9th Cir. 2013).

(2) State statutes governing the selection of candidates for the State Board of Education by a nominating committee and by the governor implicated and restricted speech, under the First Amendment, where the committee and the governor restricted ballot access based on candidates' expressed views on certain issues.

U.S.—England v. Hatch, 43 F. Supp. 3d 1233, 314 Ed. Law Rep. 344 (D. Utah 2014).

Individual associational rights

Statutes governing ballot access by political parties implicate individual associational rights rooted in the free speech and assembly clauses of the state constitution; because citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs, such statutes inherently affect individual associational rights.

N.C.—Libertarian Party of North Carolina v. State, 365 N.C. 41, 707 S.E.2d 199 (2011).

2 U.S.—Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

Factors considered

In determining whether a statute restricting general election ballot access violates the First Amendment, the court must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification.

Mich.—Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

3 U.S.—Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982).

4 Alaska—Vogler v. Miller, 651 P.2d 1 (Alaska 1982).

Pa.—In re Nader, 580 Pa. 22, 858 A.2d 1167 (2004).

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4. Political Activities

§ 771. Right to vote; sanctity of ballot

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1688, 1691

The First Amendment assures every citizen the right to vote as he or she pleases, and substantial burdens or restrictions on such right are constitutionally suspect and must be justified by a compelling state interest.

The right to vote implicates fundamental First Amendment interests[1] and is said to derive from the First Amendment;[2] it is protected by the Fourteenth Amendment against state encroachment.[3] The First Amendment assures every citizen the right to cast his or her vote for whatever reason he or she pleases,[4] and substantial burdens or restrictions on the right to vote are constitutionally suspect[5] and must be justified by a compelling state interest.[6] However, not every law that imposes any burden upon the right to vote must be subject to strict scrutiny; instead, the rigorousness of the inquiry into the propriety of state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights.[7]

CUMULATIVE SUPPLEMENT

Cases:

Under the *Anderson-Burdick* framework, when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions. U.S. Const. Amends. 1, 14. SAM Party of New York v. Kosinski, 987 F.3d 267 (2d Cir. 2021).

When deciding whether state election laws violate plaintiff's associational rights and right to vote effectively under First and Fourteenth Amendments, court must weigh character and magnitude of asserted injury to plaintiffs' constitutional rights against precise interests put forward by state as justifications for burden imposed by its rule. U.S. Const. Amends. 1, 14. Graveline v. Benson, 992 F.3d 524 (6th Cir. 2021).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981), decision aff'd, 657 F.2d 691 (5th Cir. 1981).
Alaska—Vogler v. Miller, 651 P.2d 1 (Alaska 1982).
No one is guaranteed the right to vote for a specific individual
U.S.—Zielasko v. State of Ohio, 873 F.2d 957 (6th Cir. 1989).
Right to form and associate with organization to facilitate political speech
U.S.—Constitution Party of Kansas v. Biggs, 813 F. Supp. 2d 1274 (D. Kan. 2011), aff'd, 695 F.3d 1140 (10th Cir. 2012).

2 U.S.—Wright v. Mahan, 478 F. Supp. 468 (E.D. Va. 1979), aff'd, 620 F.2d 296 (4th Cir. 1980).

3 U.S.—Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981), decision aff'd, 657 F.2d 691 (5th Cir. 1981).

4 U.S.—Kirksey v. City of Jackson, Mississippi, 663 F.2d 659 (5th Cir. 1981), decision clarified on denial of reh'g, 669 F.2d 316 (5th Cir. 1982).

5 U.S.—Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975).

6 U.S.—Bright v. Baesler, 336 F. Supp. 527 (E.D. Ky. 1971).

7 U.S.—Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).
Alaska—Sonneman v. State, 969 P.2d 632 (Alaska 1998).
Md.—Howard County Citizens for Open Government v. Howard County Bd. of Elections, 201 Md. App. 605, 30 A.3d 245 (2011).
Tex.—State v. Hodges, 92 S.W.3d 489 (Tex. 2002).
Factors considered
In analyzing a constitutional challenge to a state's election law, a court must first consider the character and magnitude of the asserted injury to the rights protected that the plaintiff seeks to vindicate, and then identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by the rule.
U.S.—England v. Hatch, 43 F. Supp. 3d 1233, 314 Ed. Law Rep. 344 (D. Utah 2014).
Neb.—Pick v. Nelson, 247 Neb. 487, 528 N.W.2d 309 (1995).
Nev.—Nevadans for the Protection of Property Rights, Inc. v. Heller, 122 Nev. 894, 141 P.3d 1235 (2006).
Pa.—Petition of Berg, 552 Pa. 126, 713 A.2d 1106 (1998).

16A C.J.S. Constitutional Law § 772

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

4. Political Activities

§ 772. Campaign contributions and expenditures

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1699 to 1701

In determining whether a governmental interest in the reporting and disclosure of campaign contributions is sufficient to justify an intrusion on First Amendment rights, the court must look to the extent of the burden which the requirements place on individual rights. The United States Supreme Court has adjudicated the validity of various provisions of the Federal Election Campaign Act.

Campaign contribution limits implicate fundamental First Amendment interests, namely, the freedoms of political expression and political association.[1] The level of scrutiny applicable to any restriction on political financial activity that implicates the First Amendment is based on the importance of the political activity to effective speech or political association.[2] A congressional interest in equalizing the relative financial resources of candidates competing for elective office is not sufficient to justify the infringement of fundamental First Amendment rights which results from limitations placed by statute on candidates' personal expenditures on their own behalf.[3]

On the other hand, a governmental interest in providing information as to the source and expenditure of political campaign funds, interest in deterring actual corruption by publicizing large contributions and expenditures, and an interest in recordkeeping

to detect violations of limitations placed on campaign contributions are of sufficient magnitude to justify intrusion on First Amendment rights.[4] However, disclosure of campaign contributions may be constitutionally required only in those limited situations where the potential benefits of disclosure are so great as to outweigh the infringement on First Amendment rights.[5] In determining whether a governmental interest in the reporting and disclosure of campaign contributions is sufficient to justify an intrusion on First Amendment rights, the court must look to the extent of the burden which the requirements place on individual rights.[6] A significant encroachment on First Amendment rights may not be justified by a mere showing of a legitimate governmental interest, but the subordinating interest of the state must survive exacting scrutiny.[7] Exacting scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action but indirectly as an unintended but inevitable result of the required disclosure.[8]

Particular provisions of Federal Election Campaign Act.

Provisions of the Federal Election Campaign Act which have been held unconstitutional by the United States Supreme Court include the prohibition on contributions by minors, which the Court held invalid as a violation of minors' rights to free expression and free association; several provisions pertaining to independent party expenditures;[9] and the provisions barring corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections, and barring corporations from using general treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office,[10] On the other hand, the Court has upheld certain limits on individual and corporate contributions and has upheld other provisions of the Act against various other constitutional challenges, including claims thatthe Act's limitations on political parties' coordinated expenditures do not comport with First Amendment free speech and associational guarantees; and that the provisions requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising, and requiring any person spending more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission, violate the First Amendment protection of political speech, as applied to a nonprofit corporation that wishes to distribute on cable television, through video-on-demand, a film regarding a political candidate and to run advertisements for the film.[11]

CUMULATIVE SUPPLEMENT

Cases:

Advertisements that mention a candidate shortly before an election are deemed sufficiently campaign-related to implicate the government's interests in political campaign contribution disclosure. U.S.C.A. Const.Amend. 1. Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Lavin v. Husted, 689 F.3d 543 (6th Cir. 2012).

2 U.S.—Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).

3 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

4 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

5 U.S.—New York Civil Liberties Union, Inc. v. Acito, 459 F. Supp. 75 (S.D. N.Y. 1978).
6 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
7 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
8 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
9 C.J.S., Elections § 587.
10 C.J.S., Elections §§ 587, 591.
11 C.J.S., Elections § 587.

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IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

4. Political Activities

§ 773. Other particular applications

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1481, 1680, 1683, 1685, 1689
West's Key Number Digest, Lobbying 6

Various statutes dealing with political activities, such as those requiring an independent candidate for President to file a statement of candidacy and a nominating petition an exceedingly long time in advance of the general election, have been found violative of constitutional rights.

In light of the principles with regard to political activities in relation to the First Amendment,[1] various particular statutes, regulations, and official acts dealing with political activities have been found violative of constitutional rights, such as statutes proscribing the distribution on election day of any writing "against any candidate";[2] providing for the termination of an officer of a political party, subpoeaned by a grand jury to testify concerning the conduct of his or her office, who refuses to testify or waive immunity against subsequent criminal prosecution;[3] requiring an independent candidate for President to file a statement of candidacy and a nominating petition a long time in advance of the general election;[4] limiting the amounts which individuals may contribute to political groups supporting or opposing state-wide issues;[5] providing that a candidate for office, other than for judicial or state-wide office, is not eligible to receive a nomination and to appear on the ballot as a candidate of both a political

party and an independent group;[6] restricting the rights of holders of video draw poker licenses to contribute to candidates or the political committees of candidates;[7] and ordinances selectively prohibiting political signs while permitting other signs.[8]

Furthermore, other statutes relating to political activities which constitute violations of constitutional rights include those conditioning a place on the ballot for a party or its candidates on the filing of an affidavit that it does not advocate the overthrow of any government by force or violence,[9] refusing the right to candidacy for public office unless a person files a sworn affidavit that he or she is not and never has been a "communist" or "subversive person,"[10] directing a new party to meet a minimum primary vote requirement in order to qualify for a place on the general election ballot,[11] or prohibiting the use of the name of a political party established in one district for use by candidates in another district.[12]

On the other hand, various particular statutes, regulations, and official acts with respect to political activities do not constitute violations of constitutional rights, such as statutes requiring the disclosure of various lobbying activities;[13] setting forth a durational residency requirement as a condition of eligibility for the office of governor;[14] requiring a specified percentage of the registered voters to show support for the nomination of a political party or its candidate;[15] restricting candidacy in a general election by a candidate or voter in a primary election;[16] permitting blanket primary elections, pursuant to which a voter has the right to vote for any candidate, regardless of party affiliation of the voter or candidate;[17] and banning postelection political campaign contributions.[18]

Other adjudications have upheld regulatory provisions prohibiting any person seeking a public office or position at a party primary election by declaration of candidacy from becoming a candidate at the following general election for any public office by nominating petition or by write-in[19] or providing that voters in primary elections must have been enrolled in the party prior to the previous general election.[20]

Footnotes

1 § 769.

2 Fla.—Gore Newspapers Co. v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975), judgment aff'd, 550 F.2d 1057 (5th Cir. 1977).

3 U.S.—Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977).

4 U.S.—Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

5 U.S.—Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), decision aff'd, 621 F.2d 195 (5th Cir. 1980), judgment aff'd, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

6 U.S.—United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D. N.Y. 1971).

7 La.—Penn v. State ex rel. Foster, 751 So. 2d 823 (La. 1999).

8 U.S.—Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972).

9 U.S.—Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974).

10 U.S.—Socialist Workers Party v. Hardy, 480 F. Supp. 941 (E.D. La. 1977), aff'd, 607 F.2d 704 (5th Cir. 1979).

11 Mich.—Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

12 U.S.—Norman v. Reed, 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

13 U.S.—Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying, 534 F. Supp. 489, 3 Ed. Law Rep. 554 (N.D. N.Y. 1982).

14 U.S.—Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), judgment aff'd, 414 U.S. 802, 94 S. Ct. 125, 38 L. Ed. 2d 39 (1973).

15 U.S.—People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972).

New party

U.S.—Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982).

16 Tex.—State v. Hodges, 92 S.W.3d 489 (Tex. 2002).

17 Alaska—O'Callaghan v. State, 914 P.2d 1250 (Alaska 1996).

18 Alaska—State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999).

19 Ohio—Foster v. Cuyahoga County Bd. of Elections, 53 Ohio App. 2d 213, 7 Ohio Op. 3d 282, 373 N.E.2d 1274 (8th Dist. Cuyahoga County 1977).

20 U.S.—Rosario v. Rockefeller, 458 F.2d 649 (2d Cir. 1972), judgment aff'd, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973).

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16A C.J.S. Constitutional Law § 774

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

5. Prisoners

§ 774. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1194, 1195

A prisoner retains at least some of his or her First Amendment rights on incarceration but only those that are not inconsistent with his or her status as a prisoner or with the legitimate objectives of the corrections system.

Although a prisoner is not entitled to the full protection of the Constitution and does not retain all of his or her constitutional rights while in prison,[1] a prisoner does not lose all of his or her constitutional rights on incarceration,[2] and he or she retains constitutional rights to the fullest extent consistent with prison discipline, security, and the punitive regimen.[3] Generally, First Amendment rights are retained although a person is a prisoner[4] or a pretrial detainee.[5] More specifically, the First Amendment rights that are retained are those that are not inconsistent with the status of prisoner or with the legitimate penological objectives of the corrections system.[6]

The freedom to exercise First Amendment rights may be less absolute behind prison walls than on the outside,[7] and restrictions on their exercise may be justifiable as part of the punitive regimen of a prison.[8] The restrictions must be warranted by state interests related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment,[9] however,

even though there need not be a certainty that the governmental interest will be adversely affected without the restriction.[10] Moreover, the restrictions must be no greater than is necessary to protect the particular governmental interest involved.[11]

To justify a restriction on an inmate's First Amendment rights, specific evidence, or at least an explanation of the purpose of the policy, is required.[12] Therefore, challenges to prison practices and restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system[13] and in view of the corrections agency's interest in the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners.[14]

Footnotes

1 U.S.—Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982).
S.C.—Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).
W. Va.—State ex rel. White v. Narick, 170 W. Va. 195, 292 S.E.2d 54 (1982).

2 U.S.—Farid v. Ellen, 593 F.3d 233 (2d Cir. 2010); Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982).
Iowa—Risdal v. State, 573 N.W.2d 261 (Iowa 1998).
S.C.—Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

3 U.S.—Bowling v. Enomoto, 514 F. Supp. 201 (N.D. Cal. 1981); Sobell v. Reed, 327 F. Supp. 1294 (S.D. N.Y. 1971).

4 U.S.—Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979); Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982); Nickens v. White, 536 F.2d 802 (8th Cir. 1976).

5 U.S.—Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982).

6 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).
Colo.—Alward v. Golder, 148 P.3d 424 (Colo. App. 2006).
Iowa—Mark v. State, 556 N.W.2d 152 (Iowa 1996).
Kan.—Merryfield v. Turner, 191 P.3d 1137 (Kan. Ct. App. 2008), unpublished.
Minn.—Mitchell v. Smith, 817 N.W.2d 742 (Minn. Ct. App. 2012).
Rational relationship to legitimate penological objectives
U.S.—Overton v. Bazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162, 6 A.L.R.6th 731 (2003).

7 U.S.—National Prisoners Reform Ass'n v. Sharkey, 347 F. Supp. 1234 (D.R.I. 1972).

8 U.S.—Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971).

9 U.S.—Barrett v. Com. of Va., 689 F.2d 498 (4th Cir. 1982); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 19 Fed. R. Serv. 2d 1198 (8th Cir. 1974); Moskowitz v. Wilkinson, 432 F. Supp. 947 (D. Conn. 1977).
Four-prong inquiry
An analysis of whether a prisoner's constitutional rights are impinged by prison regulations calls for a four-prong inquiry: (1) whether there is valid, rational connection between the prison regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact the accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) the absence of ready alternatives, or, in other words, whether the rule at issue is an exaggerated response to prison concerns.
Iowa—Risdal v. State, 573 N.W.2d 261 (Iowa 1998).
Keeping inmate in restrictive custody
A state prison inmate's membership in an underground organization that was currently suspected of instigating an armed escape of one of its members from prison, when coupled with the inmate's own prior escape, the nature of her criminal connections, and the length of her sentence supported a reasonable apprehension that she posed a unique security risk; thus, prison officials did not violate the inmate's First Amendment rights by keeping her in restrictive custody status.
U.S.—Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980).

10 U.S.—Moskowitz v. Wilkinson, 432 F. Supp. 947 (D. Conn. 1977).

11 U.S.—Barrett v. Com. of Va., 689 F.2d 498 (4th Cir. 1982); Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981).

12 U.S.—Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981).

Heavy burden

Because of the preferred status of First Amendment rights of incarcerated persons, a heavy burden is placed on correctional authorities to justify a restriction.

U.S.—Burnham v. Oswald, 342 F. Supp. 880 (W.D. N.Y. 1972).

13 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978).

Conn.—Roque v. Warden, Connecticut Correctional Inst., Somers, 181 Conn. 85, 434 A.2d 348 (1980).

14 U.S.—Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981).

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16A C.J.S. Constitutional Law § 775

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IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

5. Prisoners

§ 775. Particular rights or restrictions thereon

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1194, 1195

Various claim of infringement of particular constitutional rights of prisoners have been adjudicated.

Prisoners have a constitutional right, protected by the First and Fourteenth Amendments, to communicate with friends, relatives, attorneys, and public officials by means of visits, correspondence, and telephone calls.[1] Likewise, the right of an inmate to marry is one protected by the Constitution although this right, like many other rights, is subject to substantial restrictions as a result of incarceration.[2] On the other hand, there is no constitutional right to smoke in jail or prison,[3] or to provide legal assistance to fellow inmates,[4] and a prisoner who does not suffer from a terminal illness has no constitutional right to commit the suicidal act of ending his or her life by starvation as would override the compelling interest of the State in preserving life and preventing suicide.[5]

In the light of these principles, various particular matters constitute a violation of the rights of prisoners, such as a rule prohibiting prisoners from corresponding with unrelated minors without the prior consent of the minors' parents,[6] the willful deprivation of vital medical treatment,[7] and restrictions on the reading material of prisoners.[8]

On the other hand, various particular actions do not constitute a violation of the rights of prisoners, such as the transfer of prisoners to other penal institutions for disciplinary reasons;[9] pretrial confinement;[10] a rule precluding inmates from receiving magazines, newspapers, and books through the mail unless received directly from the publisher;[11] a policy prohibiting inmate-to-inmate correspondence;[12] a requirement that a prisoner disclose all revenue or assets as a condition of parole eligibility;[13] the refusal of a court to permit an inmate to use marijuana for religious purposes;[14] and the refusal to permit prisoners to organize a prisoners' union.[15]

Censorship.

A regulation permitting the reading of inmates' nonprivileged outgoing mail does not violate the First or Fourteenth Amendments where the regulation is generally necessary to further substantial governmental interests in security, order, and rehabilitation.[16] Furthermore, censorship of prisoners' reading material can be no greater than generally necessary or essential to protect the governmental interests involved in the security of the institution and the rehabilitation of the inmates.[17] Prison regulations affecting the sending of publications to prisoners must be analyzed under a reasonableness standard; the regulations are valid if they are reasonably related to legitimate penological interests.[18] Under this standard, it is rational for the Federal Bureau of Prisons to exclude materials that, although not necessarily likely to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.[19]

Confiscation of personal property.

There is no constitutional right that prohibits prison officials from confiscating most of a prisoner's personal property pending release from prison, absent any violation of due process of law.[20]

Filing of grievance.

The filing of a grievance against a prison official by a prisoner is a First Amendment right.[21]

Foreign penal decrees.

The execution of foreign penal decrees may not serve as an artifice to circumvent the procedural and substantive guaranties of the Bill of Rights.[22]

Artificial insemination.

A prisoner has no fundamental constitutional right to father a child through artificial insemination such as would require prison authorities to render assistance.[23]

CUMULATIVE SUPPLEMENT

Cases:

State rules requiring a pharmacy to deliver or dispense drugs, which rules contained secular but not religious exemptions, were facially neutral, for purposes of determining the level of scrutiny for a violation of the Free Exercise Clause; rules made no

reference to any religious practice, conduct, belief, or motivation. U.S.C.A. Const.Amend. 1; WAC 246–863–095, 246–869–010, 246–869–150(1). Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

Allowing publisher's magazine to reach inmate subscribers would have significant impact on guards and other inmates, and on allocation of prison resources generally, weighing in favor of finding that decision of Florida Department of Corrections to impound magazine for security and safety reasons did not violate publisher's First Amendment right of access; magazine's advertisements gave inmates opportunity to use prohibited services, such as three-way calling and pen pal solicitation, and allowing inmates to see those advertisements would require Department to allocate more resources to preventing security problems. U.S. Const. Amend. 1. Prison Legal News v. Secretary, Florida Department of Corrections, 890 F.3d 954 (11th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—LeVier v. Woodson, 443 F.2d 360 (10th Cir. 1971); Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978).
Pretrial detainees
U.S.—Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).
Correspondence with writ writer
A complete prohibition of an inmate's correspondence with his writ writer impermissibly restricted the inmate's First Amendment rights where an inspection of incoming and outgoing mail provided sufficient protection of whatever government interests may have been involved.
U.S.—Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981).

2 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).
Restrictions found valid
A proposed rule prohibiting marriage by prison inmates who are sentenced to death, inmates under a life sentence who must serve at least 25 years before parole, and inmates who wish to marry other inmates or other persons within the terms of a statute has a rational basis in the service of a legitimate state interest and is not constitutionally invalid.
Fla.—Department of Corrections v. Roseman, 390 So. 2d 394 (Fla. 1st DCA 1980).
Fundamental constitutional right
A prisoner's right to marry is a fundamental constitutional right that may be infringed only upon a showing of both an overriding governmental interest and the absence of a less restrictive alternative method.
Cal.—In re Carrafa, 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (3d Dist. 1978).

3 U.S.—Reynolds v. Bucks, 833 F. Supp. 518 (E.D. Pa. 1993).

4 U.S.—Shaw v. Murphy, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001).

5 R.I.—Laurie v. Senecal, 666 A.2d 806 (R.I. 1995).

6 U.S.—Hearn v. Morris, 526 F. Supp. 267 (E.D. Cal. 1981).

7 U.S.—Williams v. Treen, 671 F.2d 892 (5th Cir. 1982).

8 U.S.—Vest v. Lubbock County Com'rs Court, 444 F. Supp. 824 (N.D. Tex. 1977).

9 U.S.—Curry-Bey v. Jackson, 422 F. Supp. 926 (D.D.C. 1976).
Participation in prison disturbance
Evidence of participation in a prison disturbance and a history of disciplinary troubles demonstrated that the decision to transfer a prisoner to another penal institution was not in violation of First Amendment freedoms despite the contention that he was being transferred to keep him from testifying on behalf of another inmate at a hearing.
U.S.—Lamb v. Hutto, 467 F. Supp. 562 (E.D. Va. 1979).

10 U.S.—Mingo v. Patterson, 455 F. Supp. 1358 (D. Colo. 1978).

11 U.S.—Cotton v. Lockhart, 620 F.2d 670 (8th Cir. 1980).

12 U.S.—Schlobohm v. U.S. Atty. Gen., 479 F. Supp. 401 (M.D. Pa. 1979); Fowler v. Graham, 478 F. Supp. 90 (D.S.C. 1979).

13 Fla.—Panzavecchia v. Crockett, 379 So. 2d 1047 (Fla. 1st DCA 1980).

14 Okla.—L'Aquarius v. Maynard, 1981 OK 115, 634 P.2d 1310 (Okla. 1981).

15 U.S.—Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974).

16 Conn.—Washington v. Meachum, 238 Conn. 692, 680 A.2d 262 (1996).

17 U.S.—McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982) (overruled on other grounds by, Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985)).

18 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

19 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

20 U.S.—Stringer v. DeRobertis, 541 F. Supp. 605 (N.D. Ill. 1982), judgment aff'd, 738 F.2d 442 (7th Cir. 1984).

Seizure of book

There was no violation of First Amendment rights in a seizure from a state prison inmate's cell of a book which discussed common infantry weapons, included detailed diagrams of various weapons and handwritten notations commenting on the performance ability of the weapons and the importance of various chapters.

U.S.—Brown v. Hilton, 492 F. Supp. 771 (D.N.J. 1980).

21 N.Y.—Hunyadi v. Smith, 112 Misc. 2d 484, 447 N.Y.S.2d 226 (Sup 1982).

Retaliation for filing of grievance, see § 776.

22 U.S.—Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980).

23 U.S.—Goodwin v. Turner, 702 F. Supp. 1452 (W.D. Mo. 1988), aff'd, 908 F.2d 1395 (8th Cir. 1990).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

B. Activities or Persons Protected

5. Prisoners

§ 776. Retaliation by prison authorities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1171, 1196

The courts have variously stated the elements a prisoner alleging retaliation for the exercise of his or her First Amendment rights must demonstrate in order to state a claim.

It has been said that a prisoner alleging retaliation for the exercise of his or her First Amendment rights must demonstrate that (1) the prisoner engaged in protected conduct, (2) a state actor took adverse action against the prisoner, (3) the adverse action was taken because of the prisoner's protected conduct, (4) the adverse action had a chilling effect on the prisoner's protected conduct, and (5) the adverse action did not reasonably advance a legitimate correctional goal.[1] It has also been stated that a prisoner must allege that: (1) the type of activity he or she engaged in was protected under the First Amendment; (2) the State impermissibly infringed on the prisoner's right to engage in the protected activity; and (3) the retaliatory action was not reasonably related to a legitimate penological purpose.[2] Under another formulation, in order to state a claim for First Amendment retaliation, a prison inmate must allege that: (1) the conduct that led to the retaliation was constitutionally protected; (2) the inmate suffered some adverse action at the hands of the prison officials; and (3) there is a causal link between the two.[3]

To allege a causal connection necessary to state First Amendment retaliation claim, a prisoner need only establish that protected activity was at least a motivating factor in the prison official's decision to take the retaliatory action, not that it must be the sole motivating factor.[4] To survive summary judgment on the "retaliatory motive" issue, a prisoner has only to submit evidence of a retaliatory motive sufficient to create a factual issue in this regard, and while the timing of a punishment alone is not sufficient to establish motivation, it may be circumstantial evidence of motivation.[5]

The relevant standard for deciding in a retaliation action whether an inmate suffered a deprivation likely to deter similar First Amendment activity in the future is not subjective but objective, that is, what effect the retaliation would have on an ordinary prisoner.[6] In this context, temporary discipline of an inmate is not necessarily de minimis.[7]

Shifting of burden of proof.

An inmate asserting a First Amendment retaliation claim bears the burden of showing that protected conduct was substantial or motivating factor in the disciplinary decision, and the prison official then bears the burden of establishing that the disciplinary action would have occurred even absent a retaliatory motivation, which he or she may satisfy by showing that the inmate committed prohibited conduct charged in a misbehavior report.[8]

Retaliation for filing of grievance.

A prison official's filing of disciplinary charges against an inmate in retaliation for the inmate's exercise of his or her right to file a grievance, even if the grievance is determined to be without merit, is a violation of the inmate's constitutional rights.[9]

CUMULATIVE SUPPLEMENT

Cases:

To prove intent and causation, as element of First Amendment retaliation claim, a prisoner must at least establish a chronology of events from which retaliation may be plausibly inferred. U.S. Const. Amend. 1. Petzold v. Rostollan, 946 F.3d 242 (5th Cir. 2019).

While a prisoner can state a claim of retaliation under the First Amendment by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform. U.S. Const. Amend. 1. Muntaqim v. Kelley, 2019 Ark. 240, 581 S.W.3d 496 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Nev.—Angel v. Cruse, 321 P.3d 895, 130 Nev. Adv. Op. No. 25 (Nev. 2014).

2 Idaho—Lightner v. Hardison, 149 Idaho 712, 239 P.3d 817 (Ct. App. 2010).

3 Pa.—Tindell v. Department of Corrections, 87 A.3d 1029 (Pa. Commw. Ct. 2014).

4 Ind.—Medley v. Lemmon, 994 N.E.2d 1177 (Ind. Ct. App. 2013), transfer denied, 999 N.E.2d 418 (Ind. 2013).

5 Nev.—Angel v. Cruse, 321 P.3d 895, 130 Nev. Adv. Op. No. 25 (Nev. 2014).

6 Ill.—Fillmore v. Walker, 372 Ill. Dec. 33, 991 N.E.2d 340 (App. Ct. 4th Dist. 2013).

Person of ordinary firmness

U.S.—Bistrian v. Levi, 696 F.3d 352, 82 A.L.R. Fed. 2d 689 (3d Cir. 2012).

Tex.—Institutional Div. of Texas Dept. of Criminal Justice v. Powell, 318 S.W.3d 889 (Tex. 2010).

7 Ill.—Fillmore v. Walker, 372 Ill. Dec. 33, 991 N.E.2d 340 (App. Ct. 4th Dist. 2013).

8 U.S.—Holland v. Goord, 758 F.3d 215 (2d Cir. 2014).

9 Iowa—Risdal v. State, 573 N.W.2d 261 (Iowa 1998).

Prison rule invalid

The application of a prison rule which, in effect, subjects an inmate to discipline merely because he or she complains impermissibly abridges the inmate's First Amendment rights.

U.S.—Wolfel v. Bates, 707 F.2d 932 (6th Cir. 1983).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Equal Protection
A.L.R. Index, Fifth Amendment
A.L.R. Index, First Amendment
A.L.R. Index, Fourteenth Amendment
A.L.R. Index, Freedom of Association
A.L.R. Index, Imprisonment for Debt
A.L.R. Index, Involuntary Servitude and Peonage
A.L.R. Index, Ninth Amendment
A.L.R. Index, Police Power
West's A.L.R. Digest, Constitutional Law 1079, 1091, 1102 to 1105, 1114, 1121(3), 1280 to 1288

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

1. In General

§ 777. Right of personal liberty as fundamental

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

The right of personal liberty is one of the fundamental or natural rights and is constitutionally protected.

Personal liberty, or the right to the enjoyment of life and liberty, is one of the fundamental or natural rights.[1] Although there is no broad legal or constitutional "right to be let alone,"[2] the right to personal liberty has been found in the First, Fourteenth,[3] and Ninth[4] Amendments of the U.S. Constitution and in various state constitutions.[5] Generally, the term "liberty," as employed in the Bills of Rights of state constitutions, is as comprehensive as the same term in the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.[6] It is at least as sacred as private property rights[7] and is inalienable.[8] It may not be submitted to a vote and may not depend on the outcome of an election,[9] as a mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.[10]

Except insofar as they may come within recognized limitations and restrictions,[11] all statutes, ordinances, and official acts which infringe on the liberty of the individual are unconstitutional and void.[12] It is a constitutional obligation of the courts

to safeguard personal liberties[13] and to protect life and liberty against high-handed or capricious official invasions operating under legal forms.[14]

The government may, when necessary, protect personal liberties even when that protection, to a limited extent, subordinates the constitutional interests of others.[15] Any doubt which might exist between approving the exercise of uncertain judicial discretion and the liberty of a citizen should be resolved in favor of the citizen.[16]

According to some authorities, the constitutional guaranty forbids individual interference with personal liberty as well as legislative infringement.[17] According to others, however, individuals have no right to be free from the deprivation of liberty rights by private actors.[18]

Footnotes

1 U.S.—West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).
Cal.—In re Kemper, 112 Cal. App. 3d 434, 169 Cal. Rptr. 513 (1st Dist. 1980).
N.Y.—People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976).
As to natural rights, see § 721.

2 U.S.—Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989).

3 Ohio—City of Cleveland v. Howard, 40 Ohio Misc. 2d 7, 532 N.E.2d 1325 (Mun. Ct. 1987).

4 Ohio—City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1, 536 N.E.2d 67 (Mun. Ct. 1987).

5 Cal.—In re Maurice S., 90 Cal. App. 3d 190, 153 Cal. Rptr. 317 (1st Dist. 1979).
Haw.—State v. French, 77 Haw. 222, 883 P.2d 644 (Ct. App. 1994).
Ind.—Dearing v. State, 229 Ind. 131, 95 N.E.2d 832 (1951).
Ky.—Blue Movies, Inc. v. Louisville/Jefferson County Metro Government, 317 S.W.3d 23 (Ky. 2010).
Mass.—Mansfield Beauty Academy v. Board of Registration of Hairdressers, 326 Mass. 624, 96 N.E.2d 145 (1951).
Rights retained by people
A state constitutional provision, stating that enumeration in the constitution of certain rights shall not be construed to deny others retained by the people, stands as an acknowledgement that fundamental personal rights, not specifically enumerated in the constitution, still are protected from governmental infringement; those rights not granted to the state by the constitution remain with the people.
Wyo.—Watt v. Watt, 971 P.2d 608 (Wyo. 1999) (overruled on other grounds by, Arnott v. Arnott, 2012 WY 167, 293 P.3d 440 (Wyo. 2012)).

6 Mass.—Holcombe v. Creamer, 231 Mass. 99, 120 N.E. 354 (1918).
§§ 1883 to 1908.

7 Mass.—Bamel v. Building Com'r of Brookline, 250 Mass. 82, 145 N.E. 272 (1924).
Mich.—Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946).
N.Y.—People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976).
As to the right to acquire, hold, and dispose of property, see §§ 845 to 850.

8 Ind.—Weisenberger v. State, 202 Ind. 424, 175 N.E. 238 (1931).
N.J.—Cameron v. International Alliance of Theatrical Stage Emp. and Moving Picture Operators of U. S. and Canada, Local Union No. 384, of Hudson County, 118 N.J. Eq. 11, 176 A. 692, 97 A.L.R. 594 (Ct. Err. & App. 1935).

9 U.S.—West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).
Neb.—Hanson v. Union Pac. R. Co., 160 Neb. 669, 71 N.W.2d 526 (1955), judgment rev'd on other grounds, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956).

10 U.S.—O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

No compelling interest

The government can demonstrate no compelling interest for legislating on the basis of any sectarian doctrine, nor may the State infringe individual liberty and personal autonomy because of majoritarian demands to safeguard some intrinsic value unrelated to protection of the rights and interests of persons with constitutional status.

Mont.—Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999).

11 Discussed in § 781.

12 Fla.—Varholy v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943).

Ill.—Carter v. Southern Limited, 303 Ill. App. 502, 25 N.E.2d 590 (1st Dist. 1940).

Ind.—Dearing v. State, 229 Ind. 131, 95 N.E.2d 832 (1951).

Mass.—Meunier's Case, 319 Mass. 421, 66 N.E.2d 198 (1946).

Ohio—American Cancer Soc. v. City of Dayton, 94 Ohio App. 131, 50 Ohio Op. 218, 110 N.E.2d 605 (2d Dist. Montgomery County 1952), judgment aff'd, 160 Ohio St. 114, 51 Ohio Op. 32, 114 N.E.2d 219 (1953).

13 U.S.—Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

14 Pa.—Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 7 A.2d 302 (1939).

15 Pa.—Com. v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981).

16 N.Y.—Girard v. Rossi, 40 A.D.2d 13, 337 N.Y.S.2d 34 (4th Dep't 1972).

17 Cal.—People v. Amdur, 123 Cal. App. 2d Supp. 951, 267 P.2d 445 (App. Dep't Super. Ct. 1954).

N.J.—Cameron v. International Alliance of Theatrical Stage Emp. and Moving Picture Operators of U. S. and Canada, Local Union No. 384, of Hudson County, 118 N.J. Eq. 11, 176 A. 692, 97 A.L.R. 594 (Ct. Err. & App. 1935).

Volunteer fire department acting with authority of government subject to constitutional restraints

U.S.—Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337 (4th Cir. 2000).

18 U.S.—Van Ort v. Estate of Stanewich, 92 F.3d 831 (9th Cir. 1996).

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C. Personal Liberty

1. In General

§ 778. Effect of minority

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

The right of personal liberty is available to minors.

The constitutional protection of the right to liberty is available to minors.[1] The right to move freely, without fear of governmental restriction or invasion, is a fundamental right which extends to minors and may not be abridged unless the State shows a compelling state interest.[2]

However, children's liberty interests are less extensive than those of adults[3] and may be subordinated in appropriate circumstances to the State's interest in preserving and promoting children's welfare[4] and in supervising, caring for, and rehabilitating minors.[5] The State has broader authority to control and supervise the activities of children than those of adults[6] because of the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.[7] It has been held, therefore, that while an adult's liberty interest in freedom of movement is a fundamental right, a minor's is not.[8]

Some courts have struck down ordinances imposing curfews on minors as an infringement on minors' right of free movement.[9] Others have upheld such ordinances in the interests of protecting juveniles from victimization and of reducing juvenile crime.[10] An ordinance prohibiting minors from being on public streets when their attendance is required in schools has been upheld as not unduly restricting minors' freedom of movement.[11]

An adjudicated youth offender does not enjoy the same fundamental freedom of liberty as before the adjudication.[12]

Footnotes

1 U.S.—Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972).
Ohio—City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1, 536 N.E.2d 67 (Mun. Ct. 1987).
Truancy
Commitment of a habitual truant to a school for truants involves a substantial abridgment of personal liberties, and the laudable governmental purpose of education must be achieved by the means which least infringe upon these liberties.
Ill.—Chicago Bd. of Ed. v. Terrile, 47 Ill. App. 3d 75, 5 Ill. Dec. 455, 361 N.E.2d 778 (1st Dist. 1977).

2 Ohio—City of Wadsworth v. Owens, 42 Ohio Misc. 2d 1, 536 N.E.2d 67 (Mun. Ct. 1987).
As to the requirement that a restriction on travel be justified by a compelling governmental interest, see § 789.
Interstate travel
The right to interstate travel extends in some measure to juveniles as citizens of the United States.
U.S.—Johnson v. City of Opelousas, 658 F.2d 1065, 32 Fed. R. Serv. 2d 879 (5th Cir. 1981).

3 U.S.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

4 U.S.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).
Restrictions on at-risk minor
An at-risk minor's right to move freely was not fundamental, such that a dispositional order imposing geographic restrictions was subject to less than strict scrutiny, where the minor, who had attempted suicide, experienced psychiatric hospitalization, and ran away to the streets with transient youths and adult men for 10 days, was vulnerable, her ability to make critical decisions was impaired, and her parents requested the court's support in their efforts to regain control of the minor so that they could better carry out their parental role.
Wash.—In re M.G., 103 Wash. App. 111, 11 P.3d 335 (Div. 1 2000).

5 Mont.—Matter of C.H., 210 Mont. 184, 683 P.2d 931 (1984).

6 Colo.—People in Interest of J.M., 768 P.2d 219 (Colo. 1989).

7 U.S.—Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

8 Colo.—People in Interest of J.M., 768 P.2d 219 (Colo. 1989).
W. Va.—Sale ex rel. Sale v. Goldman, 208 W. Va. 186, 539 S.E.2d 446 (2000).

9 U.S.—Nunez by Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).
Fla.—State v. J.P., 907 So. 2d 1101 (Fla. 2004).
Ohio—In re Spagnoletti, 122 Ohio App. 3d 683, 702 N.E.2d 917 (11th Dist. Lake County 1997).
Wash.—State v. J.D., 86 Wash. App. 501, 937 P.2d 630 (Div. 1 1997).

10 Ariz.—Matter of Appeal In Maricopa County, Juvenile Action No. JT9065297, 181 Ariz. 69, 887 P.2d 599 (Ct. App. Div. 1 1994).
Colo.—People in Interest of J.M., 768 P.2d 219 (Colo. 1989).
Wis.—City of Milwaukee v. K.F., 145 Wis. 2d 24, 426 N.W.2d 329 (1988).

11 Ohio—In re Carpenter, 31 Ohio App. 2d 184, 60 Ohio Op. 2d 287, 287 N.E.2d 399 (10th Dist. Franklin County 1972).

12 Or.—State ex rel. Juv. Dept. of Multnomah County v. Nicholls, 192 Or. App. 604, 87 P.3d 680 (2004).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

1. In General

§ 779. Effect of mental disability

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079, 4337

Mentally retarded and mentally ill persons have a constitutional right to personal liberty.

Preeminent among the constitutional rights of a mentally retarded person is personal liberty.[1] The involuntary commitment or hospitalization of an individual for mental treatment is a deprivation of his or her liberty[2] and can be justified only by a recognized and substantial government interest.[3] Statutes regarding involuntary commitment proceedings should be construed strictly in favor of the patient.[4] The state cannot constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or herself or with the help of others.[5]

A mentally retarded person does not, however, have a constitutional guarantee of a right to live in the community of his or her choice or in the least restrictive environment.[6]

Footnotes

1 Ill.—People v. Reliford, 65 Ill. App. 3d 177, 21 Ill. Dec. 778, 382 N.E.2d 72 (1st Dist. 1978).

2 U.S.—Rhyne v. Henderson County, 973 F.2d 386 (5th Cir. 1992); Walters v. Western State Hosp., 864 F.2d 695 (10th Cir. 1988).
Ariz.—In re Pima County Mental Health No. MH 3079-4-11, 228 Ariz. 341, 266 P.3d 367 (Ct. App. Div. 2 2011).
Fla.—Lavender v. State, 889 So. 2d 882 (Fla. 5th DCA 2004).
Ill.—In re Martens, 269 Ill. App. 3d 324, 206 Ill. Dec. 895, 646 N.E.2d 27 (2d Dist. 1995).
Ind.—Leedy v. State, 998 N.E.2d 307 (Ind. Ct. App. 2013), transfer denied, 5 N.E.3d 767 (Ind. 2014).
Pa.—In re Remley, 324 Pa. Super. 163, 471 A.2d 514 (1984).
Va.—Warrington v. Com., 280 Va. 365, 699 S.E.2d 233 (2010).
Wash.—In re Detention of June Johnson, 179 Wash. App. 579, 322 P.3d 22 (Div. 1 2014), review denied, 181 Wash. 2d 1005, 332 P.3d 984 (2014).

3 Ill.—People v. Reliford, 65 Ill. App. 3d 177, 21 Ill. Dec. 778, 382 N.E.2d 72 (1st Dist. 1978).
Legitimate state interests
Wash.—In re Detention of June Johnson, 179 Wash. App. 579, 322 P.3d 22 (Div. 1 2014), review denied, 181 Wash. 2d 1005, 332 P.3d 984 (2014).

4 Ill.—In re Martens, 269 Ill. App. 3d 324, 206 Ill. Dec. 895, 646 N.E.2d 27 (2d Dist. 1995).

5 U.S.—O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

6 U.S.—P.C. v. McLaughlin, 913 F.2d 1033, 62 Ed. Law Rep. 881 (2d Cir. 1990).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

1. In General

§ 780. Definitions, nature, and extent

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

The right of personal liberty consists of the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct without any restraint except by due process of law.

Liberty under the law extends to the full range of conduct which an individual is free to pursue.[1] It is not limited to freedoms exclusively named in either the Bill of Rights or elsewhere in the Constitution[2] but instead extends to the basic values implicit in the concept of ordered liberty and to basic civil rights.[3]

The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person to whatever place one's inclination may direct without any restraint except by due process of law.[4] It includes a person's right to be let alone and to determine his or her mode of life whether it be a life of publicity or of privacy, and to order his or her life and manage his or her affairs in a manner that may be most agreeable to him or her, so long as he or she does not violate the rights of others or of the public.[5]

Individuals have a right to be free from physical restraint[6] and to move about as long as they are not committing a crime.[7] Freedom of movement is a fundamental right within the concept of personal liberty[8] and is generally associated with the fundamental right to travel.[9]

The right of personal liberty frequently includes other rights, such as the right to enter into and maintain certain human relationships,[10] including family relationships and the parent-child relationship,[11] the right to forego medical treatment,[12] and the absence of arbitrary and unreasonable restraint on a person in the conduct of his or her business and the handling of his or her property.[13]

While there is some authority to the contrary,[14] the right to live where one chooses is generally regarded as a fundamental right and an integral part of the right of liberty and is constitutionally protected.[15]

Liberty in this sense is the liberty of natural, not artificial, persons.[16] Certain purely personal constitutional guarantees are unavailable to corporations and other organizations.[17] Whether a right is purely personal depends on its nature, history, and purpose.[18]

Footnotes

1 U.S.—Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F.3d 585, 2003 FED App. 0363P (6th Cir. 2003); Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968).

2 U.S.—Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va. 1973), judgment aff'd, 414 U.S. 1034, 94 S. Ct. 533, 38 L. Ed. 2d 327 (1973) and judgment aff'd, 414 U.S. 1034, 94 S. Ct. 534, 38 L. Ed. 2d 327 (1973).

Cal.—City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313 (1970).

3 Cal.—City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313 (1970).

4 U.S.—Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

Okla.—Dowell v. City of Tulsa, 1954 OK 194, 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954).

Pretrial detention

Any pretrial detention impinges on right to liberty.

N.Y.—People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976).

Right not to be imprisoned without hearing

U.S.—Jackson v. Fair, 846 F.2d 811 (1st Cir. 1988).

5 Ga.—McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

6 Cal.—People v. Landau, 214 Cal. App. 4th 1, 154 Cal. Rptr. 3d 1 (4th Dist. 2013), review filed, (Mar. 21, 2013).

Md.—Wheeler v. State, 160 Md. App. 566, 864 A.2d 1058 (2005).

Mass.—Com. v. Knapp, 441 Mass. 157, 804 N.E.2d 885 (2004).

Wis.—State ex rel. Marberry v. Macht, 2002 WI App 133, 254 Wis. 2d 690, 648 N.W.2d 522 (Ct. App. 2002), decision rev'd on other grounds, 2003 WI 79, 262 Wis. 2d 720, 665 N.W.2d 155 (2003).

Arrest and detention

U.S.—Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).

Right not reserved exclusively for U.S. citizens

U.S.—Lozano-Castaneda v. Garcia, 238 F. Supp. 2d 853 (W.D. Tex. 2002).

7 Wash.—State v. Lee, 135 Wash. 2d 369, 957 P.2d 741 (1998).

8 U.S.—Nunez by Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).

Cal.—People v. Trevisanut, 160 Cal. App. 3d Supp. 12, 207 Cal. Rptr. 921 (App. Dep't Super. Ct. 1984).

Colo.—People in Interest of J.M., 768 P.2d 219 (Colo. 1989).
Haw.—Coyle v. Compton, 85 Haw. 197, 940 P.2d 404 (Ct. App. 1997).
Md.—Wheeler v. State, 160 Md. App. 566, 864 A.2d 1058 (2005).
Mass.—Com. v. Knapp, 441 Mass. 157, 804 N.E.2d 885 (2004).
Mont.—Matter of C.H., 210 Mont. 184, 683 P.2d 931 (1984).

9 U.S.—Gary v. City of Warner Robins, Ga., 311 F.3d 1334 (11th Cir. 2002).
As to the right to travel, see §§ 786 to 797.

10 Tex.—Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000).

11 U.S.—Kipps v. Caillier, 205 F.3d 203, 142 Ed. Law Rep. 640 (5th Cir. 2000).
Mont.—Matter of J.L.S., 234 Mont. 201, 761 P.2d 838 (1988).
Vt.—In re S.B.L., 150 Vt. 294, 553 A.2d 1078 (1988).

12 Ky.—Woods v. Com., 142 S.W.3d 24 (Ky. 2004).
Ohio—Steele v. Hamilton Cty. Community Mental Health Bd., 90 Ohio St. 3d 176, 2000-Ohio-47, 736 N.E.2d 10 (2000).
Right of pretrial detainee in avoiding unwanted antipsychotic medication
U.S.—Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

13 Neb.—McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 160 Neb. 319, 68 N.W.2d 608 (1955).

14 U.S.—Doe v. Miller, 405 F.3d 700, 25 A.L.R.6th 695 (8th Cir. 2005).

15 Cal.—Conservatorship of Valerie N., 40 Cal. 3d 143, 219 Cal. Rptr. 387, 707 P.2d 760 (1985).
Mich.—Michigan State Employees Ass'n v. Civil Service Commission, 91 Mich. App. 135, 283 N.W.2d 672 (1979).
Ohio—Allison v. City of Akron, 45 Ohio App. 2d 227, 74 Ohio Op. 2d 343, 343 N.E.2d 128 (9th Dist. Summit County 1974).
Under state constitution
N.H.—Seabrook Police Ass'n v. Town of Seabrook, 138 N.H. 177, 635 A.2d 1371 (1993).
Part of right to travel
Minn.—LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000).
As to the right to travel, see §§ 786 to 797.

16 U.S.—Oney v. Oklahoma City, 120 F.2d 861 (C.C.A. 10th Cir. 1941).

17 U.S.—Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002).

18 U.S.—Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

2. Limitations and Restrictions

§ 781. Generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

The constitutional right of liberty is not absolute but is subject to the regulatory powers of the government.

The constitutional right of liberty does not import absolute liberty of action.[1] The right must yield when outweighed by legitimate state interests[2] or when the freedoms of others are intruded upon.[3] The right must also yield if necessary for the benefit of organized society as a whole.[4] However, government action which has some effect on individual liberty or privacy may not be held unconstitutional simply because the court finds it unnecessary in whole or in part.[5]

A state has the power to abridge personal liberty for the purpose of protecting larger interests,[6] and even fundamental liberties cannot be used to jeopardize the members of the community.[7] The right of free movement is not absolute and may be restricted in the public interest.[8] Thus, courts have upheld stalking statutes,[9] protective orders against domestic abuse,[10] and sex offender registration and notification requirements[11] against claims that they infringe the right to freedom of movement. However, there is authority that the unsupported assumption of Congress in adopting a federal statute, that all defendants charged with possession or receipt of child pornography must have their liberty interest in freedom of movement restrained in order to protect

children from sexual attacks and other violent crimes, was procedurally invalid and offended a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.[12]

Arrest.

There is no fundamental right to freedom of movement when there is probable cause to arrest.[13]

Legislative right to obtain information.

Citizens have no right to protection from inconvenience, monetary loss, or even public embarrassment, to the unreasonable detriment of the legislative right to obtain information.[14]

Footnotes

1 U.S.—Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
Cal.—Whaler's Village Club v. California Coastal Com., 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (2d Dist. 1985).
Mo.—City of Pleasant Valley v. Baker, 991 S.W.2d 725 (Mo. Ct. App. W.D. 1999).
Va.—DePriest v. Com., 33 Va. App. 754, 537 S.E.2d 1 (2000).
Arbitrary restraint
Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.
N.M.—State v. Druktenis, 135 N.M. 223, 2004-NMCA-032, 86 P.3d 1050 (Ct. App. 2004).

2 U.S.—Stradley v. Andersen, 349 F. Supp. 1120 (D. Neb. 1972), judgment aff'd, 478 F.2d 188 (8th Cir. 1973).
Fla.—Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084 (Fla. 4th DCA 1977), judgment aff'd, 379 So. 2d 346 (Fla. 1979).
Compelling government interest
Alaska—Doe v. State, Dept. of Public Safety, 92 P.3d 398 (Alaska 2004).

3 U.S.—Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
Ohio—City of Cleveland v. Howard, 40 Ohio Misc. 2d 7, 532 N.E.2d 1325 (Mun. Ct. 1987).
Va.—DePriest v. Com., 33 Va. App. 754, 537 S.E.2d 1 (2000).
Trespass statutes upheld
Cal.—Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).
Conn.—State v. Steinmann, 20 Conn. App. 599, 569 A.2d 557 (1990).

4 U.S.—U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
Iowa—Gibb v. Hansen, 286 N.W.2d 180 (Iowa 1979).
N.Y.—Conlon v. Marshall, 185 Misc. 638, 59 N.Y.S.2d 52 (Sup 1945), order aff'd, 271 A.D. 972, 68 N.Y.S.2d 438 (2d Dep't 1947).
Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

5 U.S.—American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, 118 F.3d 786 (D.C. Cir. 1997).

6 **Reasonableness as criterion**
Ohio—Jarvella v. Willoughby-Eastlake City School Dist. Bd. of Ed., 12 Ohio Misc. 288, 41 Ohio Op. 2d 423, 233 N.E.2d 143 (C.P. 1967).

7 Wash.—State v. Scheffel, 82 Wash. 2d 872, 514 P.2d 1052 (1973).

8 Cal.—In re White, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (5th Dist. 1979).

9 Del.—Snowden v. State, 677 A.2d 33 (Del. 1996).
Utah—Salt Lake City v. Lopez, 935 P.2d 1259 (Utah Ct. App. 1997).

10 Haw.—Coyle v. Compton, 85 Haw. 197, 940 P.2d 404 (Ct. App. 1997).

Or.—Delgado v. Souders, 146 Or. App. 580, 934 P.2d 1132 (1997), decision aff'd, 334 Or. 122, 46 P.3d 729 (2002).
Wash.—Spence v. Kaminski, 103 Wash. App. 325, 12 P.3d 1030 (Div. 3 2000), publication ordered, (Nov. 21, 2000).

11 U.S.—John Does 1-4 v. Snyder, 932 F. Supp. 2d 803 (E.D. Mich. 2013).
Mass.—Coe v. Sex Offender Registry Bd., 442 Mass. 250, 812 N.E.2d 913 (2004).
N.J.—In re Registrant J.G., 169 N.J. 304, 777 A.2d 891 (2001).

12 U.S.—U.S. v. Polouizzi, 697 F. Supp. 2d 381 (E.D. N.Y. 2010).

13 U.S.—Hedgepeth ex rel. Hedgepeth v. Washington Metropolitan Area Transit Authority, 386 F.3d 1148 (D.C. Cir. 2004).

14 N.H.—Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954).

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IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

2. Limitations and Restrictions

§ 782. Under police power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

Under the police power, a state may enact laws regulating, restraining, and prohibiting those things which are harmful to the well-being of the people although such regulation, restraint, or prohibition interferes with, curtails, or diminishes individual liberty.

Under the police power,[1] individual liberty may be limited and restricted so as to promote the general or public welfare,[2] and so as to further the interests of and promote national defense,[3] public health,[4] public safety and order,[5] and public morals,[6] as by the regulation of gambling,[7] and to prevent fraud.[8] Personal rights may be reasonably limited in times of great danger to public safety.[9]

Footnotes

1 Discussed, generally, in §§ 699 to 720.

2 Ariz.—Vong v. Aune, 235 Ariz. 116, 328 P.3d 1057 (Ct. App. Div. 1 2014), review denied, (Nov. 6, 2014) and petition for certiorari filed, 2015 WL 504947 (U.S. 2015).
Cal.—In re White, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (5th Dist. 1979).
Idaho—State v. Gibson, 108 Idaho 202, 697 P.2d 1216 (Ct. App. 1985).
N.Y.—People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (County Ct. 1968).
Ohio—State v. Black, 2002-Ohio-731, 2002 WL 252393 (Ohio Ct. App. 6th Dist. Huron County 2002).
Under rational basis test
Me.—In re D.P., 2013 ME 40, 65 A.3d 1216 (Me. 2013).
Property rights
La.—Parish of St. Charles v. R.H. Creager, Inc., 55 So. 3d 884 (La. Ct. App. 5th Cir. 2010), writ denied, 60 So. 3d 1250 (La. 2011).

3 U.S.—Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943).

4 Ariz.—Vong v. Aune, 235 Ariz. 116, 328 P.3d 1057 (Ct. App. Div. 1 2014), review denied, (Nov. 6, 2014) and petition for certiorari filed, 2015 WL 504947 (U.S. 2015).
Ill.—Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939).
Tenn.—State v. Greeson, 174 Tenn. 178, 124 S.W.2d 253 (1939).
Health and comfort of community
Mo.—City of Pleasant Valley v. Baker, 991 S.W.2d 725 (Mo. Ct. App. W.D. 1999).

5 Ohio—State v. Black, 2002-Ohio-731, 2002 WL 252393 (Ohio Ct. App. 6th Dist. Huron County 2002).
Public safety
Cal.—Concerned Dog Owners of California v. City of Los Angeles, 194 Cal. App. 4th 1219, 123 Cal. Rptr. 3d 774 (2d Dist. 2011).
Travel on streets
N.H.—State v. Nickerson, 120 N.H. 821, 424 A.2d 190 (1980).
N.C.—State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).
Arrests for speeding
U.S.—Dixon v. District of Columbia, 666 F.3d 1337 (D.C. Cir. 2011).

6 Ariz.—Vong v. Aune, 235 Ariz. 116, 328 P.3d 1057 (Ct. App. Div. 1 2014), review denied, (Nov. 6, 2014) and petition for certiorari filed, 2015 WL 504947 (U.S. 2015).
Cal.—Ex parte Maki, 56 Cal. App. 2d 635, 133 P.2d 64 (2d Dist. 1943).
Ill.—Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939).

7 Mich.—Parkes v. Bartlett, 236 Mich. 460, 210 N.W. 492, 47 A.L.R. 1128 (1926).

8 N.Y.—People v. Goldberger, 163 N.Y.S. 663 (Spec. Sess. 1916).

9 Del.—Taylor v. Municipal Court for City of Wilmington, 247 A.2d 914 (Del. Super. Ct. 1968).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

2. Limitations and Restrictions

§ 783. Limitations on regulatory and police powers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

The government may not, under the guise of police regulation, arbitrarily invade the liberty of an individual.

Even though the right of personal liberty is subject to the police power,[1] the government may not, under the guise of police regulation, arbitrarily invade the liberty of an individual.[2] A limitation on individual liberty must have an appropriate relation to the safety of the state.[3] To sustain an encroachment on an individual's liberty, there should be an obvious and real connection between the regulation and its purpose to protect the public welfare.[4]

Freedom of movement, as a fundamental right, may be restricted only where necessary to further compelling state interests.[5] Such restrictions must be narrowly circumscribed to withstand a constitutional challenge for overbreadth and vagueness.[6] Generally, if the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.[7]

The limitation of freedom to make and act on personal decisions which are less significant than fundamental freedoms requires some showing of public need,[8] and when the personal liberty claimed has a high order of importance, the State must make a strong showing of need for its curtailment.[9]

The court must in all cases weigh the circumstances and appraise the reasons in support of regulation of the right to exercise the liberties safeguarded by the First Amendment[10] and the court will vigorously scrutinize any claim of authority to invoke it, to assure that the power is exercised only in accordance with the law.[11]

Footnotes

1 Discussed in § 782.

2 Ky.—Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 307 Ky. 689, 211 S.W.2d 867 (1948).
N.Y.—People v. Collier, 85 Misc. 2d 529, 376 N.Y.S.2d 954 (Sup 1975).
Ohio—City of Cincinnati v. Correll, 141 Ohio St. 535, 26 Ohio Op. 116, 49 N.E.2d 412 (1943).

3 U.S.—Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).
N.H.—State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941), aff'd, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

4 Ariz.—State v. Also, 11 Ariz. App. 227, 463 P.2d 122 (Div. 1 1969).
Okla.—Cryan v. State, 1978 OK CR 91, 583 P.2d 1122 (Okla. Crim. App. 1978).

5 U.S.—Gayle v. Governor of Guam, 414 F. Supp. 636 (D. Guam 1976).
Colo.—People in Interest of J.M., 768 P.2d 219 (Colo. 1989).
Fla.—State v. J.P., 907 So. 2d 1101 (Fla. 2004).
Kan.—Kansas Commission on Civil Rights v. Sears, Roebuck & Co., 216 Kan. 306, 532 P.2d 1263 (1975).
Pa.—Com. ex rel. Specter v. Moak, 452 Pa. 482, 307 A.2d 884 (1973).
Wash.—State v. J.D., 86 Wash. App. 501, 937 P.2d 630 (Div. 1 1997).
Restriction not shown
U.S.—Whitney v. City of Milan, 720 F. Supp. 2d 958 (W.D. Tenn. 2010).

6 U.S.—Johnson v. City of Opelousas, 658 F.2d 1065, 32 Fed. R. Serv. 2d 879 (5th Cir. 1981).
Curfew in injunction against gang's and gang members' activities
Cal.—People ex rel. Reisig v. Acuna, 182 Cal. App. 4th 866, 106 Cal. Rptr. 3d 560 (3d Dist. 2010).
Narrowly tailored to achieve a compelling government interest
Mass.—Com. v. Weston W., 455 Mass. 24, 913 N.E.2d 832 (2009).

7 U.S.—Kusper v. Pontikes, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973); Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984).
Cal.—Sussli v. City of San Mateo, 120 Cal. App. 3d 1, 173 Cal. Rptr. 781 (1st Dist. 1981).
Colo.—City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972).
Ill.—People v. Klick, 66 Ill. 2d 269, 5 Ill. Dec. 858, 362 N.E.2d 329, 95 A.L.R.3d 406 (1977).
Mich.—Sponick v. City of Detroit Police Dept., 49 Mich. App. 162, 211 N.W.2d 674 (1973).
N.J.—State v. Mangold, 82 N.J. 575, 414 A.2d 1312 (1980).
N.Y.—People v. Amber, 76 Misc. 2d 267, 349 N.Y.S.2d 604 (Sup 1973).
Pa.—Com. ex rel. Toole v. Yanoshak, 464 Pa. 239, 346 A.2d 304 (1975); Com. v. Sterlace, 24 Pa. Commw. 62, 354 A.2d 27 (1976).
Utah—In re Boyer, 636 P.2d 1085 (Utah 1981).

8 U.S.—Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

9 U.S.—Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), judgment aff'd, 424 F.2d 1281 (1st Cir. 1970).
Wis.—In re Guardianship of Colliton, 41 Wis. 2d 487, 164 N.W.2d 480 (1969).

10 U.S.—Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

11 Vt.—Miner v. Chater, 137 Vt. 330, 403 A.2d 274 (1979).

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16A C.J.S. Constitutional Law § 784

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

2. Limitations and Restrictions

§ 784. Validity of particular restrictions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1079

Various particular statutes, regulations, or official acts have been considered to be violative or not violative of the right of personal liberty.

Various particular statutes, regulations, or official acts have been considered violative of the right of personal liberty, such as a statute providing for the indefinite commitment of certain persons[1] and ordinances prohibiting the wearing of clothing of the opposite sex with the intent to conceal the wearer's sex[2] or prohibiting loitering.[3]

The imposition of a general municipal curfew to stem riots and disorders has been upheld as a valid emergency measure.[4]

Various particular statutes, regulations, or official acts have been held not to violate the right of personal liberty, such as statutes requiring motorcyclistsо wear protective headgear;[5] a "cruising" ordinance, prohibiting repetitive driving in certain parts of a city between certain hours;[6] and an ordinance limiting the outside employment of members of the police department.[7] Other laws or official acts which are not violative of the right of life or personal liberty include a statute authorizing a sentence of

death on conviction of first-degree murder,[8] a stop at a permanent immigration checkpoint to ascertain the citizenship of persons traveling into the country,[9] laws proscribing the use of marijuana,[10] a statute limiting the right of an adopted child to see the files concerning his or her adoption,[11] and laws prohibiting members of a police force from joining a union.[12]

Footnotes

1 U.S.—U. S. ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).

2 Ill.—City of Chicago v. Wilson, 75 Ill. 2d 525, 27 Ill. Dec. 458, 389 N.E.2d 522, 12 A.L.R.4th 1242 (1978).

3 N.H.—State v. Hudson, 111 N.H. 25, 274 A.2d 878 (1971).

Chilling effect on freedom of movement

Generally, laws prohibiting loitering suffer constitutional defects because they have an unwarranted chilling effect on persons' freedom of movement.

Wash.—City of Seattle v. Slack, 113 Wash. 2d 850, 784 P.2d 494 (1989).

4 Wis.—Ervin v. State, 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

As to curfews applicable only to minors as an infringement of their liberty interests, see § 778.

5 U.S.—Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989).

N.Y.—People v. Newhouse, 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (N.Y. City Ct. 1968).

Or.—State v. Fetterly, 254 Or. 47, 456 P.2d 996 (1969).

Tenn.—Arutanoff v. Metropolitan Government of Nashville and Davidson County, 223 Tenn. 535, 448 S.W.2d 408 (1969).

Utah—State v. Acker, 26 Utah 2d 104, 485 P.2d 1038 (1971).

Vt.—Benning v. State, 161 Vt. 472, 641 A.2d 757 (1994).

6 U.S.—Lutz v. City of York, Pa., 692 F. Supp. 457 (M.D. Pa. 1988), aff'd on other grounds, 899 F.2d 255, 87 A.L.R.4th 1081 (3d Cir. 1990).

7 Ky.—Hopwood v. City of Paducah, 424 S.W.2d 134 (Ky. 1968).

8 Ala.—Ex parte Guthrie, 689 So. 2d 951 (Ala. 1997).

Conn.—State v. Webb, 238 Conn. 389, 680 A.2d 147 (1996).

Fla.—Ford v. State, 374 So. 2d 496 (Fla. 1979).

Kan.—State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001).

Neb.—Anderson v. Gunter, 235 Neb. 560, 456 N.W.2d 286 (1990).

N.Y.—People v. Hale, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup 1997).

9 U.S.—U.S. v. Arredondo-Hernandez, 574 F.2d 1312 (5th Cir. 1978).

10 Cal.—National Organization for Reform of Marijuana Laws v. Gain, 100 Cal. App. 3d 586, 161 Cal. Rptr. 181 (1st Dist. 1979).

11 Mo.—Application of Maples, 563 S.W.2d 760 (Mo. 1978).

12 Mo.—King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947).

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PART III. Overview of Protected Personal Rights and Freedoms; Police Power

IX. Personal, Civil, and Political Rights and Freedoms

C. Personal Liberty

2. Limitations and Restrictions

§ 785. Validity of particular restrictions—Personal appearance

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1091

The right to determine one's personal appearance is an ingredient of personal liberty and is constitutionally protected although it is of much less significance than other constitutional liberties.

Generally, the right to determine one's personal appearance is an ingredient of personal liberty and is constitutionally protected.[1] More specifically, the right to wear one's hair at any length or in any desired manner,[2] or to wear beards, sideburns, or mustaches,[3] is an aspect of personal liberty protected by the constitution, which is protected from arbitrary state action.[4] A state regulation of hair length may constitute an invasion of a constitutionally protected liberty,[5] and any restriction on the choice of personal appearance must be justified by a legitimate state interest reasonably related to the regulation.[6]

According to some authorities, the right to determine one's appearance may be permissibly limited only upon a showing of a substantial or compelling governmental interest,[7] but, under other authority, the right to govern one's appearance may be restricted if the State can show a rational basis for doing so,[8] as the right to govern one's appearance is of much less

significance than other constitutional liberties.[9] Thus, depending upon the circumstances, an encroachment on that right may be permissible.[10]

In determining whether statutes or regulations concerning style and length of hair and manner of dress are lawful and reasonable, each case must be decided in its own particular setting and factual background and within the context of the entire record.[11]

The right of an employee to select the length of his or her hair during the period of employment in a private sector is not constitutionally protected.[12] An employee has no constitutional right to dress and groom himself or herself in any manner he or she chooses irrespective of the dictates of his or her employer and the needs of his or her job.[13]

Footnotes

1 U.S.—Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).
Colo.—Chiappe v. State Personnel Bd., 622 P.2d 527 (Colo. 1981).

2 U.S.—Domico v. Rapides Parish School Bd., 675 F.2d 100, 3 Ed. Law Rep. 815 (5th Cir. 1982); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972).
Cal.—Chambers v. Unemployment Ins. Appeals Bd., 33 Cal. App. 3d 923, 109 Cal. Rptr. 413 (1st Dist. 1973).
Ohio—Schneider v. Ohio Youth Commission, 31 Ohio App. 2d 225, 60 Ohio Op. 2d 373, 287 N.E.2d 633 (10th Dist. Franklin County 1972).

3 U.S.—Farrell v. Smith, 310 F. Supp. 732 (D. Me. 1970); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969), judgment aff'd, 419 F.2d 1034 (7th Cir. 1969).
Ind.—Indiana Civil Rights Commission v. Sutherland Lumber, 182 Ind. App. 133, 394 N.E.2d 949 (1979).

4 Fla.—Advanced Mobilehome Systems, Inc. v. Unemployment Appeals Com'n, 663 So. 2d 1382 (Fla. 4th DCA 1995).

5 U.S.—Syrek v. Pennsylvania Air Nat. Guard, 537 F.2d 66 (3d Cir. 1976).

6 U.S.—Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

7 U.S.—Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204 (E.D. Va. 1972), dismissed, 474 F.2d 1341 (4th Cir. 1973) and aff'd, 474 F.2d 1342 (4th Cir. 1973).
Cal.—Chambers v. Unemployment Ins. Appeals Bd., 33 Cal. App. 3d 923, 109 Cal. Rptr. 413 (1st Dist. 1973).

8 U.S.—Rinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973), judgment aff'd, 491 F.2d 705 (8th Cir. 1974).
Fla.—Advanced Mobilehome Systems, Inc. v. Unemployment Appeals Com'n, 663 So. 2d 1382 (Fla. 4th DCA 1995).
Legitimate governmental interest
U.S.—Hodge v. Lynd, 88 F. Supp. 2d 1234 (D.N.M. 2000).

9 Colo.—Chiappe v. State Personnel Bd., 622 P.2d 527 (Colo. 1981).

10 U.S.—Talley v. McLucas, 366 F. Supp. 1241 (N.D. Tex. 1973).
No First Amendment right to nude sunbathing
U.S.—South Florida Free Beaches, Inc. v. City of Miami, Fla., 734 F.2d 608 (11th Cir. 1984).
Attorney
A requirement that an attorney wear a coat and tie in court was reasonable and did not violate the attorney's rights to liberty.
Alaska—Friedman v. District Court, 611 P.2d 77 (Alaska 1980).
Prison policy
A prison grooming policy which banned long hair did not violate the First Amendment.
U.S.—Davie v. Wingard, 958 F. Supp. 1244, 166 A.L.R. Fed. 709 (S.D. Ohio 1997).
Personal preference rather than expressive conduct
Where a man wears his hair and beard long as a personal preference, rather than as expressive conduct, his First Amendment rights are not violated by a restriction on hair and beard length.

Va.—Palmer v. Com., 14 Va. App. 346, 416 S.E.2d 52 (1992).

11 Ohio—Schneider v. Ohio Youth Commission, 31 Ohio App. 2d 225, 60 Ohio Op. 2d 373, 287 N.E.2d 633 (10th Dist. Franklin County 1972).

12 Ohio—Schneider v. Ohio Youth Commission, 31 Ohio App. 2d 225, 60 Ohio Op. 2d 373, 287 N.E.2d 633 (10th Dist. Franklin County 1972).

Wash.—Albertson's, Inc. v. Washington State Human Rights Commission, 14 Wash. App. 697, 544 P.2d 98, 87 A.L.R.3d 87 (Div. 1 1976).

13 N.Y.—Page Airways of Albany, Inc. v. New York State Division of Human Rights, 50 A.D.2d 83, 376 N.Y.S.2d 32 (3d Dep't 1975), order aff'd, 39 N.Y.2d 877, 386 N.Y.S.2d 223, 352 N.E.2d 140 (1976).

Dismissal not improper

A dismissal from employment based on "bias" as to mode of dress and grooming is not a per se violation of individual's constitutional rights.

U.S.—Keys v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 357 F. Supp. 376 (N.D. Ill. 1973).

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